Supreme Court, U.S.
FILED
942004 JUN 7 - 1995
OFFICE OF THE CLERK

No. 94-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

CCC INFORMATION SERVICES INC.,

Petitioner,

v.

MACLEAN HUNTER MARKET REPORTS, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

MONICA L. THOMPSON
Counsel of Record
JAMES J. CASEY
MARIANNE C. HOLZHALL
KECK, MAHIN & CATE
77 West Wacker Drive
Suite 4900
Chicago, Illinois 60601
(312) 634-7700

Counsel for Petitioner

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. 1-800-347-8208

121 pp

QUESTIONS PRESENTED

I. Whether, pursuant to the First Amendment and the Copyright Act, a court may extend copyright protection to a compilation's data which is the expression of ideas where the expression is essential to and thereby merged with the ideas.

II. Whether copying portions of a work incorporated by specific reference into, and required to be used by, state laws for purposes of assuring compliance with these laws can constitute copyright infringement.

LIST OF PARTIES AND RULE 29.1 STATEMENT

There are no parties to this proceeding not revealed in the caption of this case.

Petitioner CCC Information Services Inc. is a wholly-owned subsidiary of InfoVest Corporation, whose shares are not publicly traded.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i
LIST OF PARTIES AND RULE 29.1 STATEMENT ii
TABLE OF AUTHORITIES vi
OPINIONS BELOW 1
JURISDICTION 2
CONSTITUTIONAL AND STATUTORY PROVISIONS 2
STATEMENT OF THE CASE 4
I. FACTUAL BACKGROUND 4
A. CCC's Vehicle Valuation Files 5
B. Automobile Red Book Official Used Car Valuations 7
II. PROCEDURAL BACKGROUND 8
REASONS FOR GRANTING THE PETITION 11
I. IDEAS EXPRESSED IN A WORK ARE NOT PROTECTED 11
A. Basing Protection on the Merits of the Idea Violates the First Amendment . . . 12
B. The Scope of Copyright Protection Depends on the Type of Expression 15
1. Merger Should be Applied to Determine Protection, Not Infringement 15
2. Protecting Ideas Distorts the Infringement Analysis 18

C. A Statutory Monopoly Over the Use of Ideas Impedes the Progress of Science and the Arts 19
1. The Copyright Act Does Not Protect Ideas 20
2. Extending a Copyright Monopoly to Ideas Prevents Others From Building Upon Them 23
II. DUE PROCESS ENTITLES A PARTY TO USE INFORMATION INCORPORATED INTO LAW 26
CONCLUSION 30

APPENDIX

CCC Information Services Inc. v. Maclean Hunter Market Reports, 44 F.3d 61 (2d Cir. 1994). 1a
Judgment Order Reversing the Judgment of the District Court, dated December 5, 1994. . . 33a
Order Denying Petition for Rehearing, dated March 10, 1995 . . . . . 35a
Ruling on Plaintiff's Motion for Summary Judgment on Copyright Claims and Defendant's (Maclean Hunter Market Reports, Inc.) Motion for Partial Summary Judgment on Copyright Issues, dated April 7, 1993. . . . . 37a
District Court's Adoption of Magistrate Judge's Recommended Ruling, dated June 8, 1993 . . . . 65a

Judgment Order, dated February 25, 1994 . . . . . 66a
Federal Statutes 68a
State Statutes and Regulations 70a
Sample CCC Report. 78a
Sample Pages from the Red Book. 79a

TABLE OF AUTHORITIES

Page

CASES

Apple Computer, Inc. v. Franklin Computer Corp., 714 F.2d 1240 (3d Cir. 1983), *cert. dismissed*, 464 U.S. 1033 (1984) 15

Atari, Inc. v. North American Phillips Consumer Electronics Corp., 672 F.2d 607 (7th Cir.), *cert. denied*, 459 U.S. 880 (1982) 15

Autoskill v. National Educational Support Systems, 994 F.2d 1476 (10th Cir.), *cert. denied*, 114 S. Ct. 307 (1993) 15

Baker v. Selden, 101 U.S. 99 (1880) 12, 16, 25

Banks v. Manchester, 128 U.S. 244 (1888) 27

Bellsouth Adv. & Pub. Corp. v. Donnelley Info. Pub., 999 F.2d 1436 (11th Cir. 1993), *cert. denied*, 114 S. Ct. 943 (1994) 15

Bleistein v. Donaldson Lithographing Co, 188 U.S. 239 (1903) 13

Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141 (1989) 14

Building Officials and Code Adm. v. Code Technology, Inc., 628 F.2d 730 (1st Cir. 1980) 26, 28, 29

Campbell v. Acuff-Rose Music, Inc., 114 S. Ct. 1164 (1994) 13, 19

City of Cincinnati v. Discovery Network, Inc.,
113 S.Ct 1505 (1993) 14
Concrete Machinery Co. v. Classic Lawn Ornaments,
843 F.2d 600 (1st Cir. 1988) 15
Cooling Systems and Flexibles, Inc. v.
Stuart Radiator, Inc., 777 F.2d 485
(9th Cir. 1985) 18
Davidson v. Wheelock, 27 F. 61
(C.C.D. Minn. 1866) 27
Del Madera Properties v. Rhodes and Gardner, Inc.,
637 F. Supp. 262 (N.D. Cal. 1985),
aff'd, 820 F.2d 973 (9th Cir. 1987) 28
Edenfield v. Fane,
113 S.Ct. 1792 (1993) 14
Feist Publications, Inc. v. Rural
Telephone Service Company, Inc.,
499 U.S. 340 (1991) 11, 15, 17-20, 22
Gates Rubber Co. v. Bando Chemical Industries, Ltd.,
9 F.3d 823 (10th Cir. 1993) 11, 25
Harper & Row Publishers, Inc. v.
Nation Enterprises, 471 U.S. 539 13
Hoehling v. Universal City Studios, Inc.,
618 F.2d 972 (2d Cir.), *cert. denied*,
449 U.S. 841 (1980) 18, 25
Howell v. Miller, 91 F. 129
(6th Cir. 1898) 27
Kregos v. Associated Press,
937 F.2d 700 (2d Cir. 1991) 16, 17
M. Kramer Mfg. Co., Inc. v. Andrews,
783 F.2d 421 (4th Cir. 1986) 15

Mason v. Montgomery Data, Inc.,
967 F.2d 135 (5th Cir. 1992) 15
Miller v. Universal City Studios, Inc.,
650 F.2d 1365 (5th Cir. 1981) 18
NADA Services Corporation v. CCC Information Services Inc., No. 91 C 4593, 1991 WL 287961
(N.D. Ill. Nov. 15, 1991) 29
NEC Corp. v. Intel Corp.,
10 U.S.P.Q. 2d 1177 (N.D.Cal. 1989) 16, 17
Police Dept. of Chicago v. Mosley,
408 U.S. 92 (1972) 14
Practice Management Information Corp. v. American Medical Association,
877 F. Supp. 1386 (C.D. Cal. 1994) . . . 27, 29, 30
Rand McNally & Co. v. Fleet Management Systems, Inc.,
591 F. Supp. 726 (N.D. Ill. 1983) 28
Red Lion Broadcasting Company v. FCC,
395 U.S. 367 (1969) 13
Sid & Marty Krofft Television Products, Inc. v. McDonald's Corp., 562 F.2d 1157
(9th Cir. 1977) 16
Toro Co. v. R&R Products Co.,
787 F.2d 1208 (8th Cir. 1986) 16
Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.,
425 U.S. 748 (1976) 14
Wheaton v. Peters,
8 Pet. (33 U.S.) 591 (1834) 27

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. art I, § 8, cl. 8 . . . . . 2, 19
U.S. Const. amend. I 2
U.S. Const. amend. V 3
U.S. Const. amend. XIV, § 1 3
17 U.S.C. § 101 . . . . . 4, 21, 22
17 U.S.C. § 102 . . . . . 3, 21
17 U.S.C. § 103 . . . . . 4, 21
Conn. Gen. Stat. § 38-353(a) (1990) 4
Conn. Ins. Dept. Bull. No. IC-4 (Aug. 28, 1987) 4
N.J. Admin. Code § 11:3-10.4 (1988) 4, 27
11 N.Y. Admin. Code § 216.7(c) (1990) 4, 27
31 Pa. Code § 62.3(f) (1989) 4, 27
Tex. Educ. Code § 12.01, *et seq.* 28

TREATISES AND ARTICLES

3 *Nimmer on Copyright*
§ 13.03[B][3] (1990) 16
Compendium of Copyright Office
Practices, § 307.01 (1984) 23
Ray Patterson and Craig Joyce, *Monopolizing the Law: The Scope of Copyright Protection for Law Reports and Statutory Compilations*, 36 UCLA L. Rev. 719 (1989) 18, 20, 24
Robert A. Gorman, *Fact or Fancy: Implications for Copyright*, 29 J. Copyright Soc'y 560 (1982) 21, 22, 25

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

CCC INFORMATION SERVICES INC.,

Petitioner,

v.

MACLEAN HUNTER MARKET REPORTS, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner CCC Information Services Inc. respectfully requests this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered in this proceeding on December 5, 1994.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is reported at 44 F.3d 61 (2d Cir. 1994) and is reprinted in the Appendix at App. 1a-32a. The relevant opinion of the United States District Court for the District of

Connecticut is unpublished and is reprinted in the Appendix at App. 37a-65a.

JURISDICTION

On December 5, 1994, the Second Circuit entered its order reversing the decision of the district court. (App. 33a-34a). Petitioner timely filed a Petition for Rehearing and Suggestion for Rehearing *en Banc* on December 19, 1994. The Petition for Rehearing was denied on March 10, 1995. (App. 35a-36a). The mandate issued on March 17, 1995.

Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. art I, § 8, cl. 8:

The Congress shall have power . . . to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.

U.S. Const. amend. I:

Congress shall make no law . . . abridging the freedom of speech, or of the press. . . .

U.S. Const. amend. V:

No person shall. . .be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. XIV, § 1:

. . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without the due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Copyright Act of 1976, 17 U.S.C. § 101 *et seq.*

17 U.S.C. § 102:

(a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.

(b) In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

The pertinent portions of the following statutes and regulations, also relied upon, are reproduced verbatim in the Appendix:

17 U.S.C. § 101 (App. 68a)
17 U.S.C. § 103 (App. 68a-69a)
Conn. Gen. Stat. § 38-353(a) (1990) (App. 70a)
Conn. Ins. Dept. Bull. No. IC-4 (Aug. 28, 1987) (App. 70a-71a)
N.J. Admin. Code § 11:3-10.4 (1988) (App. 71a-73a)
11 N.Y. Admin. Code § 216.7(c) (1990) (App. 73a-75a)
31 Pa. Code § 62.3(f) (1989) (App. 75a-77a)

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

Petitioner, CCC Information Services Inc. ("CCC"), sells computerized vehicle valuation reports to insurance companies who need to determine settlement values for their insureds' total loss claims. Respondent, Maclean Hunter Market Reports, Inc. ("Maclean Hunter"), publishes the "Automobile Red Book -- Official Used Car Valuations" (the "Red Book").

CCC's vehicle valuation products are multi-paged computer generated reports containing a single suggested settlement value; an accurate description of the vehicle's make, model and features to be valued; a fraud-preventing comparison of the lost vehicle to a database of previously

reported claims; and other information. In most cases, the settlement value comes from CCC's survey of automobile dealers' lots. The laws of the States of Connecticut, New Jersey, New York and Pennsylvania, however, require that total loss claims be settled on the average of the vehicle's value as derived from the Red Book and the "NADA Official Used Car Guide" (the "NADA Guide"). (App. 41a-42a; 70a-77a). The complex regulations in these states together with the guidebook rules make manual calculations of the settlement value difficult and prone to error. CCC, therefore, offers a second type of report with a settlement value calculated from the guidebooks primarily for customers who are located in these four states. (App. 42a-43a).

A. CCC's Vehicle Valuation Files

To produce its vehicle valuation reports, CCC has developed a sophisticated electronic database with numerous informational files. CCC's employees create the primary, or standard, vehicle file by defining vehicles as they appear in the market. (JA562-567).[1] CCC decides what features will cause a vehicle to be listed as a base model, and what will be treated as an add-on package, standard options and customary equipment. (*Id.*). This file is arranged by manufacturer and model in strict alphabetical order, intermingling imported and domestic vehicles, and contains over 40,000 individual listings. (JA518, JA586-587). CCC also selects and arranges a separate listing of options which

---

[1] "JA___" references are to the pages of the Joint Appendix the parties submitted to the Second Circuit.

include any feature regularly appearing on vehicles which is determined to have value.

CCC's file containing the Red Book price data is the focus of this litigation.[2] To create this file, CCC begins with duly purchased copies of the Red Book and CCC worksheets which contain base vehicle listings taken from the standard vehicle files. (JA517-522, JA588). CCC personnel look up Red Book prices for these listings and frequently must add Red Book package or option values to base prices in order to make the Red Book value correspond to CCC's listed base model. (JA512-514, JA587). Similarly, CCC personnel match Red Book option or package values to those which correspond to listings taken from CCC's files. The information on the worksheets is entered into CCC's on-line database. (JA517-522). Mileage information in the increments found in the Red Book are recorded on CCC's own formatted charts. CCC uses only the numerical data from the Red Book. (JA588).[3]

---

[2]In the early 1980s, Maclean Hunter declined CCC's request for a license to sell Red Book reports and to use Red Book trademarks throughout the United States. CCC has also sought unsuccessfully to obtain Red Book information electronically so that CCC could eliminate its manual input process.

[3]In addition to the fully calculated guidebook values that are part of the reports sold in the four statutory states, for a brief time Red Book values appeared as "reference numbers" on a few reports containing dealer survey settlement values. CCC has also furnished *ad hoc* reports which show, in aggregate, the variance between the value of the total loss claims as valued by CCC's local market survey method and the Red

CCC's reports do not contain the numbers actually expressed in the Red Book. *Compare* App. 78a (a sample CCC report) to App. 79a-80a (the applicable pages from the Red Book). Unlike the Red Book, CCC's product offers more useful information in settling claims and delivers a rapid, accurately computed valuation number under the various state guidelines.

B. Automobile Red Book Official Used Car Valuations

The Red Book editors claim that "[A]ll information in this edition has been obtained from reliable sources. It has been most carefully compiled and is believed to be correct." (App. 39a).

The Red Book is a compilation of vehicle values published eight times a year for four geographic regions. (App. 40a). On average, it lists 7000 different vehicles, covering an estimated 98% of all used vehicles available. (App. 39a). These listings are segregated by domestic and imported cars and trucks and cover seven model years. Within each section, the manufacturers are listed alphabetically and the models are listed in reverse chronological order. Package and standard option tables are interspersed with the manufacturer and model listings of the base values. Additional option tables and mileage charts appear at the back of the book. (*Id.*)

Book values. CCC has also used Red Book values as an internal quality control measure to identify a possible gross error in its own local market valuations.

The information in the Red Book is there because of customers' needs. (JA285). The wholesale, retail and finance values are published because it is "tradition." (JA282). The book projects estimated values for vehicles "in average condition" with "average mileage. "The editors "consult various market sources for data, including actual prices paid for comparable vehicles in the market place," but "do not report actual market prices because [they] believe them to be out of date and invalid for the future period [they] are valuing." (App. 40a-41a).

II. PROCEDURAL BACKGROUND

In March 1991, CCC filed suit in the United States District Court for the District of Connecticut, seeking a declaratory judgment of copyright invalidity and non-infringement with respect to Maclean Hunter's copyrights in the Red Book and for various state law tort claims. Maclean Hunter filed a counterclaim for copyright infringement.

Each party moved for summary judgment. Granting CCC's motion and denying Maclean Hunter's, Magistrate Judge Arthur Latimer on April 7, 1993 issued a recommended ruling finding that CCC did not use any of Maclean Hunter's protectable expression:

> Maclean Hunter has not persuasively demonstrated that the values published in the Red Book are anything more than interpretations or analyses of factual information which have been gathered by the Red Book staff. Clearly, the valuations embody an idea -- that of the

> ability to place a dollar value on a used car or truck -- but they do not constitute an original expression of that idea. . . .[T]he valuations certainly appear to be nothing more than unprotected derivations and analyses of preexisting material.

(App. 51a).

The magistrate judge found that "practically speaking, there really is only one accessible way to express the idea of an item's value -- through use of a number," (App. 56a), and concluded that the copyright doctrine of merger, which provides that "expression of an idea is not protected when there is only one or so few ways of expressing an idea that protection of the expression would effectively protect the idea itself," precluded a finding of infringement. (App. 55a).

Finally, the court concluded that the Red Book is in the public domain because "the Red Book is virtually 'indispensable to statutory compliance. . . .'" (App. 60a).

The recommended ruling was adopted by the District Court on June 9, 1993. (App. 65a). Maclean Hunter filed a notice of appeal on July 2, 1993.[4]

---

[4]Summary judgment in favor of Maclean Hunter on the state law claims was entered on May 4, 1993. A final judgment was entered on February 25, 1994. (App. 66a-67a).

On December 5, 1994, the Second Circuit reversed the District Court's decision, and directed that judgment be entered in favor of Maclean Hunter. The Second Circuit believed the price data to be protectable because they were original to Maclean Hunter, stating, "[Red Book's] valuations were neither reports of historical prices nor mechanical derivations of historical prices or other data. Rather, they represented predictions by the Red Book editors of future prices estimated to cover specified geographic regions." (App. 13a).

Further, the Second Circuit determined that in certain situations the merger doctrine would not apply, stating that in cases of wholesale takings of compilations, "a *selective* application" of the doctrine, "withholding its application as to soft ideas infused with taste and opinion, will carry out the statutory policy to protect innovative compilations without impairing the policy that requires public access to ideas of a more important and useful kind." (App. 26a-27a).

Finally, though not disputing that the Red Book was indispensable to statutory compliance, the Second Circuit concluded: "We are not prepared to hold that a state's reference to a copyrighted work as a standard for valuation results in loss of the copyright." (App. 31a).

The Second Circuit remanded the case to the District Court with directions that judgment be entered in Maclean Hunter's favor. (App. 34a). CCC's motion for rehearing and suggestion for rehearing *en banc* was denied on March 10, 1995.

REASONS FOR GRANTING THE PETITION

I. IDEAS EXPRESSED IN A WORK ARE NOT PROTECTED

The determination that ideas infused with taste or opinion can be the subject of copyright protection raises an important issue of federal law which has not been directly decided by this Court but which merits its attention. In *Feist Publications, Inc. v. Rural Telephone Service Company, Inc.*, 499 U.S. 340 (1991), this Court addressed many issues relating to the scope of a factual compilation's copyright protection. This case asks a related, but significantly different question concerning the protectability of data comprised of ideas, which, although based on factual research, originate with the compilation's author in the sense that the exact number published in the work may not be found elsewhere.

This issue is one which is recurring and of significance beyond the immediate case. Since the *Feist* decision, another appellate court has encountered the issue. *See Gates Rubber Co. v. Bando Chemical Industries, Ltd.*, 9 F.3d 823, 843 & n. 20 (10th Cir. 1993) (numerical constants which were the opinion of an engineer who compared and interpreted a large number of test results were unprotectable facts). Further, the amicus brief filed by other publishers[5] on

---

[5]Dun & Bradstreet, Inc., which publishes commercial credit reports, credit reference publications, marketing labels, lists and directories; McGraw-Hill, Inc., whose divisions and subsidiaries include Standard & Poor's, J.J. Kenny Co., Inc., F.W. Dodge Division, Shepard's/McGraw

behalf of the appellee below indicate that this issue has widespread application and is likely to arise again.

The opinion below expands the copyright monopoly beyond the creative expression of the work to include the ideas expressed. In taking from the public domain those ideas which the court believes are "unimportant," it puts the copyright monopoly in direct conflict with the freedoms guaranteed by the First Amendment of the United States Constitution, and invites other courts to qualitatively evaluate the merits of ideas. It furthers the confusion among the lower courts about when and how to apply the merger doctrine, by suggesting that if its application is too inimical to the interests of the copyright owner, merger can be "withheld." It judicially amends § 102(b) of the Copyright Act by carving out an exception for "soft" ideas to which copyright protection will apply.

A. Basing Protection on the Merits of the Idea Violates the First Amendment

Over a century ago this Court held that copyright protection for an author's expression of an idea does not extend to the idea itself. *Baker v. Selden*, 101 U.S. 99 (1880). Since then courts have analyzed fact-based works to ensure that copyright protection in the expression does not

---

Hill and *Business Week*; and Mitchell International, which publishes books and provides electronic databases to the automotive industry, filed an amicus brief arguing in part that "collections of judgments and evaluations expressed in numerical or symbolic form are entitled to copyright protection."

monopolize ideas, preserving the public's interest in the "market place of ideas." The idea/expression dichotomy strikes a "definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author's expression." *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 556 (1985).

In expressly extending protection to the "weaker suggestion-opinion category" of ideas, the Second Circuit believed that it would "not inflict injury on the opportunity for public debate, nor restrict access to the kind of data that illuminates our understanding of the phenomena that surround us or of useful processes to solve our problems." (App. 30a). This content-based analysis makes courts the arbiters of what ideas are important enough to be free. As this Court has noted, it is "'a dangerous undertaking for persons trained only in the law to constitute themselves final judges of the worth of [a work], outside of the narrowest and most obvious limits.'" *Campbell v. Acuff-Rose Music, Inc.*, 114 S. Ct. 1164, 1173 (1994)(quoting *Bleistein v. Donaldson Lithographing Co*, 188 U.S. 239, 251 (1903)(Holmes, J.). By extending the copyright monopoly to supposedly "unimportant" ideas, a court is engaging in a form of censorship, raising serious First Amendment concerns.

"It is the purpose of the First Amendment to preserve an uninhibited market place of ideas in which truth will ultimately prevail. . . .It is the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experience which is crucial here." *Red Lion*

Broadcasting Company v. FCC, 395 U.S. 367, 390 (1969). The First Amendment protects expression against restrictions based on its "message, its ideas, its subject matter, or its content." *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). The First Amendment recognizes an "equality of status in the field of ideas." *Id.*

This policy applies to commercial speech as well. *See Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770-72 (1976). *See also City of Cincinnati v. Discovery Network, Inc.*, 113 S.Ct 1505, 1517 (1993). (an assertion that commercial speech is of "low value" cannot justify a content-based regulation under the First Amendment.) "The commercial market place, like other spheres of our social and cultural life, provides a forum where ideas and information flourish. Some of the ideas and information are vital, some of slight worth." *Edenfield v. Fane*, 113 S.Ct. 1792, 1798 (1993). Nonetheless, the speaker and the audience, not the courts, determine the value of the information. *Id.*

Copyright laws cannot take from the public domain those ideas which a court deems "less important."[6] This content-

---

[6]The Second Circuit's extension of protection to an "unimportant idea" under the copyright law is questionable, particularly in light of Congressional policy for protecting ideas under the patent law, which has far more stringent requirements and which has a far more limited duration. How can a court extend greater protection to a lesser idea under copyright law than patent law would allow? *See Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 148 (1989).

based restriction violates the public's First Amendment rights and upsets the balance achieved by the Copyright Act.

B. The Scope of Copyright Protection Depends on the Type of Expression

The merger doctrine is a necessary extension of the idea/expression analysis which has particular application to a work which does not employ creative expression, but rather "lets the facts speak for themselves." *Feist*, 499 U.S. at 349. Protecting content, however, overturns the merger doctrine and the limitations of copyright protection for minimal, unoriginal expression.

1. Merger Should be Applied to Determine Protection, Not Infringement

The circuit courts disagree as to whether merger should be applied to determine protectability in the first instance[7]

---

[7] *See, e.g., Bellsouth Adv. & Pub. Corp. v. Donnelley Info. Pub.*, 999 F.2d 1436 (11th Cir. 1993), *cert. denied*, 114 S. Ct. 943 (1994); *Autoskill v. National Educational Support Systems*, 994 F.2d 1476 (10th Cir.), *cert. denied*, 114 S. Ct. 307 (1993); *Mason v. Montgomery Data, Inc.*, 967 F.2d 135 (5th Cir. 1992); *Concrete Machinery Co. v. Classic Lawn Ornaments*, 843 F.2d 600 (1st Cir. 1988); *M. Kramer Mfg. Co., Inc. v. Andrews*, 783 F.2d 421 (4th Cir. 1986); *Apple Computer, Inc. v. Franklin Computer Corp.*, 714 F.2d 1240 (3d Cir. 1983), *cert. dismissed*, 464 U.S. 1033 (1984).

The holdings of the Ninth and Seventh Circuits are ambiguous as to the stage at which they apply the merger doctrine. *See Atari, Inc. v. North American Phillips Consumer Electronics Corp.*, 672 F.2d 607 (7th

or, as done by the Second Circuit, to determine whether an infringement has occurred. A merger analysis directly impacts the scope of protection for a work and produces results which are more consistent with the policy of the law when applied at the earlier stage. This approach supports both the First Amendment and § 102(b) of the Copyright Act, which deny protection to ideas. It also correctly focuses the infringement analysis on the protectable elements of the copyrighted work.[8] If the idea is incapable of being separated from the expression, such expression should be "considered as necessary incidents to the art, and given therewith to the public." *Baker v. Selden*, 101 U.S. at 103.

Following a suggestion from Professor Nimmer,[9] some courts, including the Second Circuit, apply the merger doctrine to determine whether there is substantial similarity between the work and the allegedly infringing material. *Kregos v. Associated Press*, 937 F.2d 700, 705 (2d Cir. 1991). The difference in this approach becomes apparent in

---

Cir.), *cert. denied*, 459 U.S. 880 (1982); *Sid & Marty Krofft Television Products, Inc. v. McDonald's Corp.*, 562 F.2d 1157 (9th Cir. 1977); *but see NEC Corp. v. Intel Corp.*, 10 U.S.P.Q. 2d 1177 (N.D.Cal. 1989).

[8]Courts using merger to determine protectability differ in their treatment of ideas which can be expressed in a very limited number of ways. Some courts deny protection altogether. *See Toro Co. v. R&R Products Co.*, 787 F.2d 1208, 1212 (8th Cir. 1986). Others severely limit the scope of protection. *See Sid & Marty Krofft Television*, 562 F.2d at 1168 ("When idea and expression coincide, there will be protection against nothing other than identical copying.")

[9]3 *Nimmer on Copyright* § 13.03[B][3] at 13-58 (1990).

dealing with minimally expressed, factual compilations where a significant portion of the work comprises data which are not eligible for copyright protection. If the merger doctrine is used to determine protection, then the infringement analysis will focus on any significant similarity with only the protectable expression of the copyrighted work. If merger is used to determine infringement, then the comparison becomes clouded by admitted similarity between the nonprotectable elements of the works. This method "lends itself. . .to the erroneous conclusion that merger is only available where the defendant has independently created an expression which happens coincidentally to be similar to the plaintiff's work. . . .[I]f a defendant has actually copied the plaintiff's work, it is unlikely to be allowed to rely on merger to avoid liability." *Kregos*, 937 F.2d at 716 (Sweet, J., concurring in part and dissenting in part). *See also NEC Corporation*, 10 U.S.P.Q.2d at 1188 (applying merger to explain coincidental similarity between two independently created works). When the Second Circuit held that it could simply "withhold" the merger doctrine, it distorted the infringement analysis. The court was influenced by factors which have no relation to the protectability of a work.[10] It

---

[10]For example, the Second Circuit was concerned that so much of the data was used, noting that "virtually the entire compendium" was taken. *See* App. 28a. It is the facts contained in the compendium which were used, but not the protectable elements of selection and arrangement featured in the work. A competitor is free to use the ideas which are exposed in such a publication. *Feist*, 499 U.S. at 349.

The Second Circuit also considered the alleged impact on the market for the Red Book. "Under copyright law, however, the effect of a defendant's conduct on the market for the plaintiff's product is irrelevant

failed to acknowledge that there were unprotectable elements in the compilation or to determine if any protectable expression had been appropriated.

2. *Protecting Ideas Distorts the Infringement Analysis*

The elements of copyright infringement require a showing of: 1) valid copyright and 2) improper appropriation. "Ordinarily, wrongful appropriation is shown by proving a 'substantial similarity' of *copyrightable* expression." *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 977 (2d Cir.), *cert. denied*, 449 U.S. 841 (1980)(emphasis in original). Even if there is an admitted use of information, there is no infringement absent a substantial similarity of protectable expression. *See Cooling Systems and Flexibles, Inc. v. Stuart Radiator, Inc.*, 777 F.2d 485, 491 (9th Cir. 1985). Factual works are subject to greater scrutiny to restrict only the use of expression, but not ideas. *Hoehling*, 618 F.2d at 979-80; *Miller v. Universal City Studios, Inc.*, 650 F.2d 1365 (5th Cir. 1981).

By admittedly protecting ideas, the Second Circuit eliminated the requirement that there must also be similarity

---

in determining liability." *See* Ray Patterson and Craig Joyce, *Monopolizing the Law: The Scope of Copyright Protection for Law Reports and Statutory Compilations*, 36 UCLA L. Rev. 719, 781 (1989). Nor, with the demise of the "sweat of the brow" rationale, is it a factor in determining protectability. *See Feist*, 499 U.S. at 353-54.

of expression.[11] The court took no account of the factual character of the Red Book materials and presumably determined that even a nonliteral use of the price data would be an infringement. Under this unqualified monopoly for ideas, no divergence of expression would be sufficient to defeat a claim of infringement.

C. A Statutory Monopoly Over the Use of Ideas Impedes the Progress of Science and the Arts

Article 1, § 8, Clause 8 of the United States Constitution gives Congress the power "to promote the progress of science and the useful arts, by securing for limited times to authors. . .the exclusive right to their respective writings. . . ." In setting its rather precise scheme for the scope of copyright protection for factual works, Congress has acted in the public's interest to promote the free flow of information. "To this end, copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information contained in the work." *Feist*, 499 U.S. at 349-350. *See also Campbell*, 114 S. Ct. at 1169 n.5.

---

[11] No copy or substantial description of the CCC database is in the record. CCC's summary judgment motion focused solely on the protectability of the Red Book. In its motion, Maclean Hunter did not put the database into the record nor did it undertake compare the database and the Red Book. The District Court made no finding of substantial similarity between the works. The Second Circuit presumed that there would be substantial similarity because there was substantial use of the information.

As if Congress had never entered this field, the court below perceived its mission as striking a new balance between the conflicting concerns for free access to ideas and providing economic incentive for authors. (App. 17a). It viewed the idea/expression dichotomy as a theory "which almost directly contradicted the original theory of copyright." (App. 18a). The Second Circuit implicitly acknowledged that the expression in the Red Book was too minimal to be separated from the idea, (App. 16a-17a), but as a policy matter, decided that the "judicially created" doctrine of merger could be "withheld" where it is too inimical to the interests of the copyright owner not to do so. (App. 18a, 27a). The Second Circuit concluded that if it allowed free use of the ideas expressed in the compendium, "virtually nothing will remain of the protection accorded by the statute to compilations." (App. 21a).

This holding upsets the Congressional balance of these concerns, tipping the scale in favor of providing economic incentive to the author instead of the public interest. *See* Patterson and Joyce, *supra*, at 732. *See also Feist*, 499 U.S. at 349. Further, it undermines the essential limitation on copyright protection because it focuses on rewarding the author's efforts and not on the quality of the expression for which protection is sought.

1. The Copyright Act Does Not Protect Ideas

In the Copyright Act, Congress unequivocally expressed both what it intended to protect and that which it did not. Congress first limited protection to "original works of

authorship fixed in a tangible medium of expression." 17 U.S.C. § 102(a). Congress further limited the scope of protection, stating: "In no case does copyright protection for an original work of authorship extend to any idea, . . . regardless of the form in which it is described, explained, illustrated, or embodied in such work." 17 U.S.C. § 102(b). Ideas contained in a work which would otherwise meet the "originality" criteria of § 102(a), therefore, are expressly excluded from protection. In § 102(b), Congress was "affirmatively declaring -- as clearly as it can and for the clearest of reasons -- that ideas are free to be copied, adapted and disseminated and that no court is to construe the federal copyright monopoly as inhibiting that freedom." Robert A. Gorman, *Fact or Fancy: Implications for Copyright*, 29 J. Copyright Soc'y 560, 604 (1982).

Congress was aware that protectable expression in a factual compilation might be thin or non-existent. It identified the protectable elements of a compilation as the original selection and arrangement of items compiled. *See* 17 U.S.C. § 101. The pre-existing materials and raw data do not qualify for protection simply by their inclusion in a compilation, and Congress restates this limitation in § 103(b). *See* 17 U.S.C. § 103(b). Data, whether ideas or facts, are categorically excluded from protection by § 102(b).

The key element of the Copyright Act is that the scope of the monopoly is determined by the type of expression. *See* Gorman, *supra*, at 572. Thus, "[i]f a compilation author clothes facts with an original collocation of words, he or she

may be able to claim a copyright in the written expression." *Feist*, 499 U.S. at 348. By contrast, however:

> Where the compilation author adds no written expression but rather lets the facts speak for themselves, the expressive element is more elusive. The only conceivable expression is the manner in which the compiler has selected and arranged the facts. Thus, if the selection and arrangement are original, these elements of the work are eligible for copyright protection. See Patry, Copyright in Compilations of Facts (or Why the "White Pages" Are Not Protectable), 12 Com. & Law 37, 64 (Dec. 1990). No matter how original the format, however, the facts themselves do not become original through association. See Patterson and Joyce 776.

Feist, 499 U.S. 349.

The Second Circuit attempted to turn the Red Book into a collective work,[12] finding that each number was an expression of the editor's selection and arrangement:

> The original aspect of Red Book's ordination (sic) and arrangement were inextricably present whenever CCC copied and republished any Red Book valuation, because each valuation incorporated the Red Book editors'

---

[12] "A 'collective work' is a work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole." 17 U.S.C. § 101.

> original judgment concerning the predicted value of that automobile, as well as their judgment as to geographic consistency within a region.

(App. 15a n.8). An individual number, however, is a class of one and expresses no selection or arrangement in a compilation copyright sense.[13] The so-called elements of selection such as the regionality of the numbers or the valuation of an "average" vehicle are nothing more than bits of the information, totally subsumed within the one number that is given for each vehicle. These are not the expression of selection and arrangement which give protection to the work as a whole.

2. *Extending a Copyright Monopoly to Ideas Prevents Others From Building Upon Them*

Attempting to protect ideas impedes the advancement and dissemination of useful knowledge. First, it creates unnecessary waste of time and effort by requiring each newcomer to independently repeat the process of discovery of the information which has been published. Second, and as is the case here, where the information cannot be found in another source, it prohibits a second comer from building upon and

---

[13]If a compilation lacks a minimum amount of original authorship, registration will be refused. For this reason, "[a]ny compilation consisting of less than four selections is considered to lack the requisite original authorship." *See* Compendium of Copyright Office Practices, § 307.01 (1984). Though Maclean Hunter registers the Red Book as a "collective work," each individual number is not a "separate and independent work."

improving the public's access to the information. Particularly where the second comer is prevented from adding considerable value to the information by providing an efficient, rapid and accurate means for its use which the copyright owner cannot, or chooses not to, offer, the public's interest is not well served. This problem recurs in numerous other settings, especially as the advancement of technology make the access to and need for current information greater than ever before.[14]

Even limiting the monopoly over information to data formed by an author's opinions or judgment does not alleviate the pernicious effect of extending copyright to ideas. Many social and commercial transactions are based on facts which, if closely examined, would be found to be infected with an author's opinion. For example, virtually all of recorded history involves some degree of hypothesis,

---

[14] [T]he new technology of electronics in the twentieth century has created a new profit potential for marketing, entertainment, information and other matter via television sets and computer terminals....[The interest is in gaining] dominance in and profit from, providing access to the information....

* * * *

Whoever the competitors, the interest which the law seeks to protect remains constant, namely, the public interest. But how can that interest be protected in the face of courts seemingly convinced that the champion of the public is the combatant actually least interested in the dissemination by others of matters supposedly free for all to use?

Patterson and Joyce, *supra*, at 803.

analysis or opinion. *See Hoehling*, 618 F.2d 972. Predictions of weather trends and climatic conditions, while less important to some, may greatly influence an agrarian based business. A system of double entry accounting is not a verifiable fact, but it is an idea which may improve record-keeping practices. *Baker v. Selden*, 101 U.S. 99 (1880). The opinions of engineers as to the value of a constant in a formula used to determine belt loads is not important information to most people, nor is it original in a copyright sense. *Gates Rubber Company*, 9 F.3d 823. The weight assigned to atoms on the periodic table is the product of observation and opinion, but is surely not subject to copyright protection. "The suggestion that analysis, prediction and belief can be monopolized, especially because rooted in expensive enterprises, is bad law." Gorman, *supra*, at 578. If protection or nonprotection under the Copyright Act depends upon whether an idea is a fact which can later be conclusively verified, there would be a serious chilling effect upon the use of information derived from published works. The very object of publishing a book of information would be frustrated because "the knowledge could not be used without incurring the guilt of piracy of the book." *Baker v. Selden*, 101 U.S. at 103 (1880).

Even limiting copyright protection to "soft" or unimportant ideas will have a chilling effect on the use of information found in a published work. How could anyone know, on such a subjective standard, whether or not the use could be an infringement? The vehicle values which seem "unimportant" to the Second Circuit are vital to "states, courts, taxing authorities, departments of welfare, insurance compa-

nies, lending institutions, car dealers, libraries and the public generally." Confidential Brief for Appellant Maclean Hunter at 47. Frequently, as here, the author purports to be publishing reliable information, implying some fact-based content. Only after the infringement would the user discover that the information is the product of analytical research or opinion. How will the marketplace of ideas test the validity or importance of information which is protected from criticism, comparison and use?

The highly subjective standard proposed by the Second Circuit will inevitably lead to inconsistent decisions. The focus on irrelevant factors to determine protectability will cause the analysis to stray further and further away from an ascertainment of original, creative expression, the touchstone of copyright protection.

II. DUE PROCESS ENTITLES A PARTY TO USE INFORMATION INCORPORATED INTO LAW

The effect of due process considerations on the scope of copyright protection for a work which is incorporated into statute is ripe for determination by this Court. The Second Circuit in this case, and the First Circuit in *Building Officials and Code Administrators v. Code Technology, Inc.*, 628 F.2d 730 (1st Cir. 1980) ("BOCA") have both reached this issue.[15] The importance of the constitutional guarantees of

---

[15] A case pending in the Ninth Circuit, *Practice Management Information Corp. v. American Medical Association*, 877 F. Supp. 1386 (C.D. Cal. 1994), also raises this point.

due process and the public's right to have access to knowledge of the law's requirements necessitates an accommodation with a copyright owner's monopoly power over portions of the law.

No one has seriously disputed, at least for the last century, that judicial opinions and statutes cannot be copyrighted, but are in the public domain. *See Banks v. Manchester*, 128 U.S. 244 (1888); *Wheaton v. Peters*, 8 Pet. (33 U.S.) 591 (1834); *Howell v. Miller*, 91 F. 129 (6th Cir. 1898); *Davidson v. Wheelock*, 27 F. 61 (C.C.D. Minn. 1866). Legislatures, however, have entered fields where the law-making body is unable to provide updated or technical information required for the statutory scheme. In this case, for example, several states have regulated the minimum value for settlement of total loss claims, by requiring that the insurer offer at least the average of the retail value for a substantially similar vehicle, as listed in the current editions of the Red Book and the NADA Guide. *See* N.J. Admin. Code § 11:3-10.4; 11 N.Y. Admin. Code § 216.7(c); 31 Pa. Code § 62.3(f). (App. 70a-77a).

The two courts of appeals which have addressed the issue of whether works that are incorporated into a state statute or regulation can be copied have reached opposite conclusions as to which policy is to prevail: the protection and rights accorded an author, or the right of public access to the

law.[16] In *BOCA*, the court recognized that the primary rationale for the refusal to extend copyright protection to opinions and statutes was the concept of due process, that the public must have access to the laws governing them. 628 F.2d at 734. At issue in *BOCA* was a model building code, privately developed and copyrighted by the plaintiff and bodily incorporated into the building code promulgated by the State of Massachusetts. The court observed:

> Due process requires people to have notice of what the law requires of them so that they may obey it and avoid its sanctions. So long as the law is generally available for the public to examine, then everyone may be considered to have constructive notice of it; any failure to gain actual notice results from simple lack of diligence. But if access to the law is limited, then the people will or may be unable to learn of its requirements and may be thereby deprived of the notice to which due process entitles them.

---

[16]The laws at issue here differ from those which require only the filing or approval of a copyrighted work, but do not mandate that a particular work's content be incorporated into the law. *See Del Madera Properties v. Rhodes and Gardner, Inc.*, 637 F. Supp. 262 (N.D. Cal. 1985), *aff'd*, 820 F.2d 973 (9th Cir. 1987); *Rand McNally & Co. v. Fleet Management Systems, Inc.*, 591 F. Supp. 726 (N.D. Ill. 1983). Nor are the laws involved here analogous to those that merely set forth the requirements for state approval, acquisition and distribution of textbooks or other educational materials. *See, e.g.*, Tex. Educ. Code § 12.01, *et seq.*

Id. Recognizing that the owner of a copyright may refuse to publish the copyrighted work, and may prevent others from publishing the work, the court stated, "We cannot see how this aspect of copyright protection can be squared with the right of the public to know the law to which it is subject." *Id.* at 735. As a result of the conflict between copyright protection and due process, the court vacated the preliminary injunction entered in favor of the plaintiff, and remanded for additional fact-finding on the issue.

The Second Circuit did not answer these due process concerns, but alluded to "countervailing considerations," such as the potential for unconstitutional takings (App. 31a-32a). Given these competing concerns, this Court must determine for future cases the extent of a copyright monopoly where portions of the work are indispensable to statutory compliance.

The issue continues to be addressed in district courts. In *NADA Services Corporation v. CCC Information Services Inc.*, No. 91 C 4593, 1991 WL 287961 (N.D. Ill. Nov. 15, 1991), the court found that the statutes and regulations at issue here required use of the NADA Guide and that it had become "indispensable to statutory compliance." *Id.* at *4.

In contrast, the court in *Practice Management Information Corp. v. American Medical Association*, 877 F. Supp. 1386 (C.D. Cal. 1994), determined that a federal agency's requirement that physicians seeking Medicare or Medicaid reimbursement use codes from a privately developed reference work did not impact the scope of copyright for the

work. According to the *Practice Management* court, "The Copyright Act denies copyright protection only for statutes and judicial opinions originally created by the federal government or its officials." *Id.* at 1390 (*citing* 17 U.S.C. §§ 101, 105).

The public's need to know and have access to the text of the law is the same regardless of whether the law is authored exclusively by a legislative body or whether the legislature incorporates text authored by a private party. An author's interest in monopolizing the expression of a work must not impede the public's meaningful access to the law.

CONCLUSION

For the foregoing reasons, petitioner CCC Information Services Inc. respectfully requests that the Court grant its Petition for a Writ of Certiorari.

Respectfully submitted,

MONICA L. THOMPSON
Counsel of Record
JAMES J. CASEY
MARIANNE C. HOLZHALL
KECK, MAHIN & CATE
77 West Wacker Drive
Suite 4900
Chicago, Illinois 60601-1693
(312) 634-7700
Counsel for Petitioner

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1312 -- August Term, 1993

(Argued: March 2, 1994 Decided: December 5, 1994)

Docket No. 93-7687

CCC INFORMATION SERVICES, INC.,

Plaintiff-Appellee,

v.

MACLEAN HUNTER MARKET REPORTS, INC.,

Defendant-Appellant,

CREATIVE AUTOMATION CO.,

Defendant.

Before:

KEARSE, PIERCE, AND LEVAL,
Circuit Judges.

Appeal from a judgment of the District Court for the District of Connecticut, Alan H. Nevas, *Judge*, adopting the report and Recommendation of Magistrate Judge Arthur H. Latimer. The district court granted summary judgment to plaintiff, declaring that plaintiff had not infringed defendant's copyright.

Reversed and remanded with instructions to enter judgment ln favor of defendant on its counterclaims alleging copyright infringement.

STEPHEN M. FELDMAN, Washington, D.C. (David Kolker, Spiegel & McDiarmid, Washington, D.C.), Attorneys for *Defendant-Appellant*.

MONICA L. THOMPSON, Chicago, Ill., (James J. Casey, Keck, Mahin & Cate, Chicago, Illinois and Lawrence H. Lissitzyn, Reid & Riege, Hartford, Connecticut), Attorneys for *Appellee*.

JAMES F. RITTINGER and MARK A. FOWLER, New York, N.Y., (Satterlee Stephens Burke & Burke, New York, N.Y.), Attorneys on the Brief for *Amici Curiae*.

LEVAL, *Circuit Judge*:

The appellant, publisher of a compendium of its projections of used car valuations, seeks to establish copyright infringement on the part of a competitor, which copied substantial portions of appellant's compendium into the computer data base of used car valuations it offers to its customers. Arising in the wake of the Supreme Court's decision in *Feist Publications, Inc. v. Rural Telephone Serv. Co.*, 499 U.S. 340, 111 S. Ct. 1282 (1991), this appeal raises the question of the scope of protection afforded by the copyright law to such compilations of informational matter. Finding no infringement, the district court granted summary judgment to the appellee. In our view, the copyright law offers more substantial protection to such compilations than envisioned in the district court's ruling. We therefore reverse.

Background

The Red Book. The appellant is Maclean Hunter Market Reports, Inc. ("Maclean"). Since 1911, Maclean, or its predecessors, have published the *Automobile Red Book -- Official Used Car Valuations* (the "Red Book").[1] The Red Book, which is published eight times a year, in different versions for each of three regions of the United States (as well as a version for the State of Wisconsin), sets forth the editors' projections of the values for the next six weeks of "average" versions of most of the used cars (up to seven

---

[1] For the entire period at issue in this case, each edition of the Red Book has included a copyright notice, and has been registered with the U.S. Copyright Office.

years old) sold in that region.[2] These predicted values are set forth separately for each automobile make, model number, body style, and engine type. Red Book also provides predicted value adjustments for various options and for mileage in 5,000 mile increments.

The valuation figures given in the Red Book are not historical market prices, quotations, or averages; nor are they derived by mathematical formulas from available statistics. They represent, rather, the Maclean editors' predictions, based on a wide variety of informational sources and their professional judgment, of expected values for "average" vehicles for the upcoming six weeks in a broad region. The introductory text asserts, "You, the subscriber, must be the final judge of the actual value of a particular vehicle. Any guide book is a supplement to and not a substitute for expertise in the complex field of used vehicle valuation."

CCC's computer services. Appellee CCC Information Services, Inc. ("CCC"), is also in the business of providing its customers with information as to the valuation of used vehicles. Rather than publishing a book, however, CCC provides information to its customers through a computer data base. Since at least 1988, CCC has itself been systematically loading major portions of the Red Book onto

---

[2] Maclean also publishes the Older Car/Truck Red Book, which offers similar projected valuations for vehicles eight to eighteen years old.

its computer network and republishing Red Book information in various forms to its customers.[3]

CCC utilizes and resells the Red Book valuations in several different forms. CCC's "VINguard Valuation Service" ("VVS") provides subscribers with the average of a vehicle's Red Book valuation and its valuation in the NADA Official Used Car Guide (the "Bluebook"), the other leading valuation book, published by the National Automobile Dealers Association ("NADA"). The offer of this average of Red Book and Bluebook satisfies a market because the laws of certain states use that average figure as a minimum for insurance payments upon the "total loss" of a vehicle. CCC's "Computerized Valuation Service" ("CVS"), while it primarily provides its subscribers with CCC's independent valuation of used cars, also provides customers with the Red Book/Bluebook average and the Red Book values standing alone.

It is uncontested that CCC earns significant revenues through the sale of its services, in which it both directly and indirectly resells the figures it copies every few weeks from the Red Book. As the court found below, since 1988 numerous Red Book customers have canceled their subscriptions, opting instead to purchase CCC's services. Op. at 25 (JA 665).

---

[3] In 1981, CCC unsuccessfully attempted to secure a license from Maclean to use Red Book valuations on its on-line services. In 1984, CCC wrote to the publisher of the Red Book to inform it that it was being "ripped off" because another computer averaging service was using Red Book's figures.

Proceedings below. CCC brought this action in 1991, seeking, inter alia, a declaratory judgment that it incurred no liability to Maclean under the copyright laws by taking and republishing material from the Red Book. Maclean counterclaimed alleging infringement. CCC then pleaded various affirmative defenses, including that it used the Red Book for its intended purpose, fair use, and that the Red Book has come into the public domain as the result of its adoption in state statutes regulating the amount of insurance payments. CCC also made various contentions based on waiver, estoppel, consent, and untimeliness.

Both sides moved for summary judgment, and the motions were referred for report and recommendation to Magistrate Judge Arthur H. Latimer. Magistrate Judge Latimer recommended to the district court that CCC's motion for summary judgment be granted. Judge Latimer found (1) that the Red Book employed no originality or creativity in the selection, coordination or arrangement of data, and therefore did not constitute a protected "original work of authorship," 17 U.S.C.A. § 101 (West 1977); (2) that the Red Book valuations were facts, or interpretations of facts, and were, therefore, not protected by copyright; (3) that, even if the entries were not facts, copyright protection was nonetheless precluded by the doctrine of "merger of idea and expression," because each entry in the Red Book is an idea -- the idea of the value of the particular vehicle -- and that idea is necessarily communicated by a dollar figure; and (4) that the Red Book had been placed in the public domain by being "incorporated into governmental regulations." District Judge Nevas then "approved, adopted and ratified"

the Magistrate Judge's recommended ruling, and judgment was entered in CCC's favor. Endorsement at JA 671.

Discussion

1. *Does the Red Book manifest originality so as to be protected by the copyright laws?* The first significant question raised by this appeal is whether Maclean holds a protected copyright interest in the Red Book. CCC contends, and the district court held, that the Red Book is nothing more than a compilation of unprotected facts, selected and organized without originality or creativity, and therefore unprotected under the Supreme Court's teachings in *Feist*. We disagree.

The Copyright Act of 1976 explicitly confers limited protection on compilations. Section 103(a) specifies that "[t]he subject matter of copyright . . . includes compilations," which are defined by Section 101 as assemblies of data "selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship"; Section 103(b) makes clear that the protection in a compilation "extends only to the material contributed by the author of such work . . . and does not imply any exclusive right in the preexisting material." 17 U.S.C.A. §§ 101 - 103 (West 1977).

In *Feist*, the Supreme Court ruled that originality is an essential element of copyright protection, and that toil, or "sweat of the brow," expended in collecting information does not justify conferring copyright protection on a compilation of facts; rather, protection attaches only if the selection,

coordination, or arrangement exhibit originality, so that "the resulting work as a whole constitutes an original work of authorship." 17 U.S.C.A. § 101 (West 1977). Concluding that a white pages telephone directory, consisting of an alphabetical listing of the names, towns of residence, and telephone numbers of all the subscribers in the area of the telephone company's franchise (as required by state law), "lack[ed] the requisite originality," 499 U.S. at 364, the Court held that the white pages were not within the protection of the copyright, and could therefore freely be copied by the publisher of another telephone directory without infringement.

Notwithstanding its conclusion with respect to such a telephone directory, the Court emphasized that:

> [o]riginal, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity. To be sure, the requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works make the grade quite easily, as they possess some creative spark, "no matter how crude, humble or obvious" it might be.

Id. at 345 (citations omitted). The Court repeatedly stressed that the required level of originality is minimal, and that most compilations, merely by exercising some independent choice in the coordination, selection, or arrangement of data,

will pass the test.[4] The telephone directory failed because it was found to be *completely* devoid of originality.

The protection of compilations is consistent with the objectives of the copyright law, which are, as dictated by the Constitution, to promote the advancement of knowledge and learning by giving authors economic incentives (in the form of exclusive rights to their creations) to labor on creative, knowledge-enriching works. U.S. Const. art. 1, § 8, cl. 8 ("Congress shall have the Power . . . To promote the

---

[4] The compilation author typically chooses which facts to include, in what order to place them, and how to arrange the collected data so that they may be used effectively by readers. These choices as to selection and arrangement, so long as they are made independently by the compiler and entail a minimal degree of creativity, are sufficiently original that Congress may protect such compilations through the copyright laws. Thus, even a directory that contains absolutely no protectible written expression, only facts, meets the constitutional minimum for copyright protection if it features an original selection or arrangement.

Feist, 499 U.S. at 348 (citations omitted).

> [T]he originality requirement is not particularly stringent. A compiler may settle upon a selection or arrangement that others have used; novelty is not required. Originality requires only that the author make the selection or arrangement independently (i.e., without copying that selection or arrangement from another work), and that it display some minimal level of creativity. Presumably, the vast majority of compilations will pass this test, but not all will. There remains a narrow category of works in which the creative spark is utterly lacking or so trivial as to be virtually nonexistent.

Id. at 358-59.

Progress of Science . . . by securing for limited Times to Authors . . . the exclusive Right to their . . . Writings"). Compilations that devise new and useful selections and arrangements of information unquestionably contribute to public knowledge by providing cheaper, easier, and better organized access to information. Without financial incentives, creators of such useful compilations might direct their energies elsewhere, depriving the public of their creations and impeding the advance of learning.

The grant of such monopoly protection to the original elements of a compilation, furthermore, imposes little cost or disadvantage to society. The facts set forth in the compilation are not protected and may be freely copied; the protection extends only to those aspects of the compilation that embody the original creation of the compiler. For these reasons, the copyright law undertakes to guarantee the exclusive rights of compilers, like other authors, to whatever is original and creative in their works, even where those original contributions are quite minimal.

The thrust of the Supreme Court's ruling in *Feist* was not to erect a high barrier of originality requirement. It was rather to specify, rejecting the strain of lower court rulings that sought to base protection on the "sweat of the brow," that *some* originality is essential to protection of authorship, and that the protection afforded extends only to those original elements. Because the protection is so limited, there is no reason under the policies of the copyright law to demand a high degree of originality. To the contrary, such a requirement would be counterproductive. The policy embodied into law is to encourage authors to publish

innovations for the common good -- not to threaten them with loss of their livelihood if their works of authorship are found insufficiently imaginative.

In recognition of these considerations, we have several times since *Feist* upheld copyright claims for compilations and similar works where the originality component was extremely modest. In *Kregos v. Associated Press*, 937 F.2d 700, 706-07 (2d Cir. 1991), for example, we reversed a ruling of the district court that the selection of nine statistical categories for use on a baseball pitching form failed to demonstrate the necessary originality. In *Key Publications. Inc. v. Chinatown Today Publishing Enterprises, Inc.*, 945 F.2d 509, 514 (2d Cir. 1991), we held, inter alia, that the selection, from a more general list, of businesses of special interest to Chinese-Americans also merited copyright protection. Several years before *Feist*, in *Eckes v. Card Prices Update*, 736 F.2d 859, 863 (2d Cir. 1984), we held that an author's subjective decision as to which baseball cards are "premium" is entitled to protection.[5]

---

[5] By contrast, we found no infringement in *Victor Lalli Enters. Inc. v. Big Red Apples Inc.*, 936 F.2d 671 (2d Cir. 1991), because the charts at issue were "'purely functional grids that offer[ed] no opportunity for variation,'" and the author exercised "neither selectivity in what he reports nor creativity in how he reports it." *Id.* at 673 (quoting district court in part).

For other examples of cases upholding data selection as meeting copyright's originality requirement, *see* 1 William F. Patry, *Copyright Law and Practice* (1994). They include:

> the choice of categories of Medicaid data to include in charts; the 'judgement and knowledge of the author respecting the social

In our view, the district court misapplied these precedents. It interpreted *Feist* and our subsequent holdings as erecting a high barrier of originality as a prerequisite to copyright protection, rather than, as *Feist* so emphatically stated, a minimal requirement.

The district court gave several reasons for its ruling that the Red Book failed the test for originality. First, the court stated, "Maclean Hunter has not persuasively demonstrated that the values published in the Red Book are anything more than interpretations or analyses of factual information . . . While Maclean Hunter may have been the first to discover and report this material, the material does not 'owe its origin' to Maclean Hunter." (Citing *Feist*, 499 U.S. at 361; Op. at 16-17 (JA 656-57).)

The district court was simply mistaken in its conclusion that the Red Book valuations were, like the telephone numbers in *Feist*, pre-existing facts that had merely been discovered by the Red Book editors. To the contrary, Maclean's evidence demonstrated without rebuttal that its

---

standing and societal relations of a limited class of the general public;' a daily time organizer; the choice of 'true' public relations firms to include in a directory; a list of state tariffs on pay telephones; selection of the most important and helpful cross-streets and assignment of address numbers for the streets; information about cable television systems throughout the United States . . . . The key factor is the exercise of some editorial judgment in the selection of data.

Id. at 199-200.

valuations were neither reports of historical prices nor mechanical derivations of historical prices or other data. Rather, they represented predictions by the Red Book editors of future prices estimated to cover specified geographic regions.[6] According to Maclean's evidence, these predictions were based not only on a multitude of data sources, but also on professional judgment and expertise. The testimony of one of Maclean's deposition witnesses indicated that fifteen considerations are weighed; among the considerations, for example, is a prediction as to how traditional competitor vehicles, as defined by Maclean, will fare against one another in the marketplace in the coming period. (JA 209-12.) The valuations themselves are original creations of Maclean.

Recognizing that "[o]riginality may also be found in the selection and ordering of particular facts or elements," the district court concluded that none had been shown. Op. at 17 (JA 657). This was because the Red Book's selection and arrangement of data represents "a logical response to the needs of the vehicle valuation market." *Id.* at 18 (JA 658). In reaching this conclusion, the district court applied the wrong standard. The fact that an arrangement of data responds *logically* to the needs of the market for which the compilation was prepared does not negate originality. To

---

[6] That they are expressed in numerical form is immaterial to originality. Original authorship warranting protection may be "fixed in any tangible medium of expression . . . includ[ing] . . . literary works." 17 U.S.C.A. 102(a) (West 1977). The Act broadly defines literary works to include "works, other than audiovisual works, expressed in words, numbers, or other verbal or numerical symbols . . . ." 17 U.S.C.A. § 101 (West 1977).

the contrary, the use of logic to solve the problems of how best to present the information being compiled is independent creation. *See Feist*, 499 U.S. at 359 (originality is to be found unless the creative spark is so utterly lacking as to be "virtually nonexistent").

We find that the selection and arrangement of data in the Red Book displayed amply sufficient originality to pass the low threshold requirement to earn copyright protection. This originality was expressed, for example, in Maclean's division of the national used car market into several regions, with independent predicted valuations for each region depending on conditions there found. A car model does not command the same value throughout a large geographic sector of the United States; used car values are responsive to local conditions and vary from place to place. A 1989 Dodge Caravan will not command the same price in San Diego as in Seattle. In furnishing a single number to cover vast regions that undoubtedly contain innumerable variations, the Red Book expresses a loose judgment that values are likely to group together with greater consistency within a defined region than without. The number produced is necessarily both approximate and original. Several other aspects of the Red Book listings also embody sufficient originality to pass *Feist*'s low threshold. These include: (1) the selection and manner of presentation of optional features for inclusion;[7] (2) the adjustment for mileage by 5,000 mile

---

[7] This selection includes far fewer than all extant options, and presents them in a manner that furnishes a single valuation to cover the particular option in numerous different vehicles. The editors make these choices to accommodate the practical space limitations imposed by the

increments (as opposed to using some other breakpoint and interval); (3) the use of the abstract concept of the "average" vehicle in each category as the subject of the valuation; and (4) the selection of the number of years' models to be included in the compilation.

We conclude for these reasons that the district court erred in ruling that the Red Book commands no copyright protection by reason of lack of originality.[8]

2. *The idea-expression dichotomy and the merger of necessary expression with the ideas expressed.* CCC's strongest argument is that it took nothing more than ideas for which the copyright law affords no protection to the author. According to this argument, (1) each entry in the Red Book expresses the authors' *idea* of the value of a particular vehicle; (2) to the extent that "expression" is to be found in the Red Book's valuations, such expression is indispensable to the statement of the idea and therefore merges with the idea, so that the expression is also not protectible; and (3) because each of Red Book's valuations could freely be taken

---

book's format, while providing the information most likely to satisfy customers' needs.

[8] The district court also believed that CCC did not infringe Red Book's original protected elements because CCC included Red Book's selection in a more extensive data base. We disagree. Original aspects of Red Book's ordination and arrangement were inextricably present whenever CCC copied and republished any Red Book valuation, because each valuation incorporated the Red Book editors' original judgment concerning the predicted value of that automobile, as well as their judgment as to geographic consistency within a region.

without infringement, all of them may be taken without infringement. This was one of the alternate bases of the district court's ruling in CCC's favor.

The argument is not easily rebutted, for it does build on classically accepted copyright doctrine. It has been long accepted that copyright protection does not extend to ideas; it protects only the means of expression employed by the author. As the Supreme Court stated in *Mazer v. Stein*, 347 U.S. 201 (1954),

> Unlike a patent, a copyright gives no exclusive right to the art disclosed; protection is given only to the expression of the idea -- not the idea itself. Thus, in *Baker v. Selden*, 101 U.S. 99, the Court held that a copyrighted book on a peculiar system of bookkeeping was not infringed by a similar book using a similar plan which achieved similar results where the alleged infringer made a different arrangement of the columns and used different headings.

Id. at 217 (footnote omitted).

It is also well established that, in order to protect the immunity of ideas from private ownership, when the expression is essential to the statement of the idea, the expression also will be unprotected, so as to insure free public access to the discussion of the idea. *See Kregos*, 937 F.2d at 705; *Herbert Rosenthal Jewelry Corp. v. Kalpakian*, 446 F.2d 738, 742 (9th Cir. 1971) ("When the 'idea' and its 'expression' are inseparable, copying the 'expression' will not be barred, since protecting the 'expression' in such

circumstances would confer a monopoly of the 'idea' upon the copyright owner free of the conditions and limitations imposed by the patent law.").[9]

We nonetheless believe the district court erred in granting judgment to CCC. We reach this conclusion based on the need to balance the conflicts and contradictions that pervade the law of copyright, and the need, where elements of the copyright law conflict, to determine, as a policy judgment, which of its commands prevails over the other.

The fundamental principle of copyright, as expressed in the Copyright Clause of the Constitution, is to promote the advance of knowledge by granting authors exclusive rights to their writings.[10] As the Supreme Court said in *Mazer*, "The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.'" 347 U.S. at 219. *See also Nimmer* at § 1.03[A]. The financial incentives to authors consist of exclusive rights to their

---

[9] For more extensive discussions of the merger doctrine, *see* William F. Patry, *Copyright Law and Practice*, 312-325 (1994); Melville B. Nimmer & David Nimmer, *Nimmer on Copyright*, § 13.03[A]-[B] (1994).

[10] This essential formulation is found in England's Statute of Anne of 1710, which conceived the Anglo-American copyright. It is entitled, "An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of Such Copies." The statute is reprinted in Patry, *supra*, at 1461-64.

writings, that may be sold or licensed for money, so that authors may earn a living from the creations that benefitted the public.

From an early time, however, courts, taking a different approach from that taken in the patent law, developed a theory which almost directly contradicted the original theory of copyright. The new theory was that ideas are too important to the advancement of knowledge to permit them to be under private ownership, and that open public debate, which is essential to a free democratic society, requires free access to the ideas to be debated.[11] *See* Patry, *supra*, at 122-23, 319, *Nimmer* at §1.10[B] 1-71 to -74, 78-79, § 13.03[B] at 13-69 to -70. Judicially created doctrine thus led to a drastic limitation on the scope of copyright protection.[12] Ideas were not to be protected; only the

---

[11] As Nimmer explains:

> The policy rationale underlying the Act's exclusion of ideas from copyright protection is clear. To grant property status to a mere idea would permit withdrawing the idea from the stock of materials that would otherwise be open to other authors, thereby narrowing the field of thought open for development and exploitation. This effect, it is reasoned, would hinder rather than promote the professed purpose of the copyright laws, i.e., "the progress of science and useful arts."

Nimmer § 13.03[B] at 13-69 to -70 (footnotes omitted).

[12] This doctrine is codified in section 102(b) of the Copyright Act, which provides that "[i]n no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless

manner of their "expression." This limitation came to be known as the "idea-expression" dichotomy.

The contradiction between these imperatives, one calling for the protection of creations that will advance the progress of knowledge, the second requiring that these same creations be free of protection, has understandably given rise to bewildering problems of interpretation as to whether copying has been of protected expression or of the unprotected ideas underlying the expression.[13] These difficulties led Judge Learned Hand to discourse in *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930), *cert. denied*, 282 U.S. 902 (1931), that takings from a protected source such as a copyrighted play can occur at varying levels of abstraction from the concrete realization of the original, and that the more remote in abstraction the taking is from the original, the less likely that it will constitute a taking of protected expression.[14] This has often been referred to as

---

of the form in which it is described, explained, illustrated, or embodied in such work." 17 U.S.C.A. § 102(b) (West 1977).

[13] As Judge Walker pointed out in *Computer Assoc. Int'l, Inc. v. Altai, Inc.*, 982 F.2d 693, 696 (2d Cir. 1992), "the copyright law seeks to establish a delicate equilibrium. On the one hand, it affords protection to authors as an incentive to create, and, on the other, it must appropriately limit the extent of that protection so as to avoid the effects of monopolistic stagnation. In applying the federal act to new types of cases, courts must always keep this symmetry in mind."

[14] His classic and oft-repeated formula was that:

> Upon any work, and especially upon a play, a great number of patterns of increasing generality will fit equally well, as more and

Hand's "abstractions test"; in fact, as Judge Hand and others have noted,[15] it is no test at all, but merely a way of perceiving the problem.[16]

This conflict between these contradictory thrusts recurs at the level of several more particular applications of the copyright law. Among them is the issue raised by this

---

> more of the incident is left out. The last may perhaps be no more than the most general statement of what the play is about, and at times might consist only of its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his "ideas," to which, apart from their expression, his property is never extended.

45 F.2d at 121.

[15] "[A]s soon as literal appropriation ceases to be the test, the whole matter is necessarily at large, so that . . . the decisions cannot help much in a new case." *Nichols*, 45 F.2d at 121. *See also Nash v. CBS Inc.*, 899 F.2d 1537, 1540 (7th Cir. 1990) ("Hand's insight is not a test at all. It is a clever way to pose the difficulties that require courts to avoid either extreme of the continuum of generality." (Easterbrook, J.)).

[16] Hand himself, writing thirty years after his above-quoted formulation of the problem, eschewed any pithy solution of it. In his last copyright case, *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487 (2d Cir. 1960), he opined that: "Obviously, no principle can be stated as to when an imitator has gone beyond copying the 'idea,' and has borrowed its 'expression.' Decisions must therefore inevitably be *ad hoc*." *Id.* at 489. Thirty years after that, Judge Keeton wrote: "It seems the better part of wisdom, if not valor, not to press the search for a suitable bright-line test . . . where Learned Hand, even after decades of experience in judging, found none." *Lotus Dev. Corp. v. Paperback Software Int'l*, 740 F. Supp. 37, 60 (D. Mass. 1990). *See also* Patry, *supra*, at 320 (dangerous to attempt to formulate broad rules in this area).

appeal of the protection, if any, to be accorded to compilations.[17] For if CCC's argument prevails, for reasons explained below, virtually nothing will remain of the protection accorded by the statute to compilations, notwithstanding the express command of the copyright statute.

Given the nature of compilations, it is almost inevitable that the original contributions of the compilers will consist of *ideas*.[18] Originality in *selection*, for example, will involve the compiler's idea of the utility to the consumer of a limited selection from the particular universe of available data. One compiler might select out of a universe of all businesses those that he believes will be of interest to the Chinese-American community, *see Key Publications*, 945 F.2d at 514, another will select those statistics as to racehorses or pitchers that are believed to be practical to the consumer in helping to pick winners, *see Kregos*, 937 F.2d 706-07; *Wabash Publishing Co. v. Flanagan*, No. 89 Civ. 1923, 1989 U.S. Dist. LEXIS 3546 (N.D. Ill. Mar. 31,

---

[17] Another is the issue of the protection to be afforded to computer programs, as to which the recently conferred statutory protection is not easily reconciled with the judge-made, and statutorily adopted, principle that copyright protection does not "extend to any idea, procedure, process [or] system." 17 U.S.C. § 102(b). It is difficult to say what a computer program is, if not an idea, procedure, process or system. *See generally, Computer Assoc. Int'l. Inc. v. Altai*, 982 F.2d at 703-07.

[18] Commentators have noted this dilemma. *See, e.g.* Jane C. Ginsburg, *No "Sweat"? Copyright and Other Protection of Works of Information After* Feist v. Rural Telephone, 92 Colum. L. Rev. 338, 346 (1992).

1989) (particular selection and arrangement of information relevant to horse races found copyrightable); *Triangle Publishing. Inc. v. New England Newspaper Publication Co.*, 46 F. Supp. 198, 201-02 (D. Mass. 1942) (same); another will offer a list of restaurants he suggests are the best, the most elegant, or offer the best value within a price range.[19] Each of these exercises in selection represents an *idea*.

In other compilations, the original contribution of the compiler will relate to ideas for the coordination, or arrangement of the data. Such ideas for arrangement are generally designed to serve the consumers' needs, making the data more useful by increasing the ease of access to those data that answer the needs of the targeted customers, or dividing the data in ways that will efficiently serve the needs of more diverse groups of customers. For example, a listing of New York restaurants might be broken down by geographic areas of the city, specialty or type (e.g., seafood, steaks and chops, vegetarian, kosher, Chinese, Indian); price range; handicapped accessibility, etc.).

It is apparent that virtually any independent creation of the compiler as to selection, coordination, or arrangement will be designed to add to the usefulness or desirability of his compendium for targeted groups of potential customers, and will represent an idea. In the case of a compilation, furthermore, such structural ideas are likely to be expressed in the most simple, unadorned, and direct fashion. If, as CCC argues, the doctrine of merger permits the wholesale

---

[19] For a more exhaustive list of compilations upheld as original, *see* Patry, *supra*, at 199-200.

copier of a compilation to take the individual expression of such ideas, so as to avoid the risk that an idea will improperly achieve protection, then the protection explicitly conferred on compilations by Section 103 of the U.S. Copyright Act will be illusory.

We addressed precisely this problem in *Kregos*, 937 F.2d 700. The plaintiff Kregos had created a form to be used to help predict the outcome of a baseball game by filling in nine statistics of the competing pitchers. The defendant contended, in terms similar to CCC's argument, that the copyright owner's idea was the utility of the nine selected statistics in helping a fan predict the outcome, and that the idea was merged in the expression of it -- in the copyrighted form that listed those nine statistics. Judge Newman wrote:

> In one sense, every compilation of facts can be considered to represent a merger of an idea with its expression. Every compiler of facts has the idea that his particular selection of facts is useful. If the compiler's idea is identified at that low level of abstraction, then the idea would always merge into the compiler's expression of it. Under that approach, there could never be a copyrightable compilation of facts.[20]

Kregos, 937 F.2d at 706.

---

[20] Judge Newman might have omitted the last two words. For the reasoning he discusses would destroy all protection for compilations of ideas as well as for compilations of facts.

Recognizing that the purpose of the doctrine of merger of expression with idea is to insure that protection not extend to ideas, the *Kregos* opinion went on to describe different categories of ideas. It distinguished between, on the one hand, those ideas that undertake to advance the understanding of phenomena or the solution of problems, such as the identification of the symptoms that are the most useful in identifying the presence of a particular disease; and those, like the pitching form there at issue, that do not undertake to explain phenomena or furnish solutions, but are infused with the author's taste or opinion. *Kregos* postulated that the importance of keeping ideas free from private ownership is far greater for ideas of the first category, directed to the understanding of phenomena or the solving of problems, than for those that merely represent the author's taste or opinion and therefore do not materially assist the understanding of future thinkers.[21] As to the latter category, the opinion asserted that, so long as the selections reflected in the compilation "involve matters of taste and personal opinion, there is no serious risk that *withholding the merger doctrine*," 937 F.2d at 707 (emphasis added), would inflict serious injury on the policy underlying the rule that forbids granting protection to an idea. This was in contrast to analyses belonging to the first category -- building blocks of understanding -- as to which "protecting the [necessary] 'expression' of the selection would clearly risk protecting the

---

[21] *See also Eckes*, 736 F.2d at 863 (upholding finding of infringement because list of premium cards "subjectively based").

idea of the analysis." *Id.* at 707.[22] Because Kregos's idea was of the soft type infused with taste or opinion, the court withheld application of the merger doctrine, permitting Kregos to exercise ownership. It accomplished this by assigning to the idea a different level of abstraction from the expression of it, so that the merger doctrine would not apply and the copyright owner would not lose protection.[23] ("His

---

[22] This dichotomy between types of ideas is supported by the wording of various legislative pronouncements, which seem uniformly to contemplate denying protection to building-block ideas explaining processes or discoveries, and do not refer to expressions of subjective opinion. Thus, § 102(b) denies protection to any "idea, procedure, process, system, method of operation, concept, principle, or discovery." 37 C.F.R. § 202.1(b), in similar terms, denies protection to "[i]deas, plans, methods, systems, or devices, as distinguished from the particular manner in which they are expressed or described in a writing." Copyright Office Circular 31 maintains that "Copyright protection is not available for "ideas or procedures for doing, making, or building things; scientific or technical methods or discoveries; business operations or procedures; mathematical principles; formulas, algorithms; or any concept, process [or] method of operation."

[23] Professor Robert Gorman has written that protection of compilations is more strongly suggested where the "works are more fanciful than functional, and where the selection criteria are driven by subjective and evaluative judgement . . ." Robert A. Gorman, *The* Feist *Case: Reflections on a Pathbreaking Copyright Decision*, 18 Rutgers Computer & Tech. L.J. 731, 751 (1992). *See also* Ginsburg, *supra*, at 345. *Compare Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972 (2d Cir.), *cert. denied*, 449 U.S. 841 (1980) (denying protection to historical theory explaining destruction of Hindenburg dirigible) *with Eckes*, 736 F.2d at 863 (granting protection to identification of "premium" baseball cards because of personal subjectivity of the selection). The *Hoehling* opinion justified the denial of protection to

'idea,' for purposes of the merger doctrine, remains the general idea that statistics can be used to assess pitching performance rather than the precise idea that his selection yields a determinable probability of outcome." 937 F.2d at 707.)

Kregos, thus, makes a policy judgment as between two evils. Unbridled application of the merger doctrine would undo the protection the copyright law intends to accord to compilations. Complete failure to apply it, however, would result in granting protection to useful ideas.[24] *Kregos* adopts a middle ground. In cases of wholesale takings of compilations, a *selective* application of the merger doctrine, withholding its application as to soft ideas infused with taste and opinion, will carry out the statutory policy to protect innovative compilations without impairing the policy that requires public access to ideas of a more important and useful kind.[25]

---

historical analysis on the theory that "[k]nowledge is expanded . . . by granting new authors of historical works a relatively free hand to build upon the work of their predecessors." 618 F.2d at 980.

[24] Discussing merger in the context of computer programs, Nimmer points out that "[t]his line [for determining when an idea has become sufficiently delineated to warrant copyright protection] is a pragmatic one, drawn not on the basis of some metaphysical property of 'ideas,' but by balancing the need to protect the labors of authors with the desire to assure free access to ideas." *Nimmer*, § 13.03[F] at 13-128.

[25] *See Herbert Rosenthal Jewelry Corp. v. Kalpakian*, 446 F.2d 738, 742 (9th Cir. 1971) ("The guiding consideration in drawing the line is the preservation of the balance between competition and protection reflected in the patent and copyright laws. What is basically at stake is

Application of the *Kregos* approach to our facts leads us to the conclusion that the district court should, as in *Kregos*, have "*withheld*" the merger doctrine. As a matter of copyright policy, this was not an appropriate instance to apply the merger doctrine so as to deprive Red Book of copyright protection. The consequences of giving CCC the benefit of the merger doctrine are too destructive of the protection the Act intends to confer on compilations, without sufficient benefit to the policy of copyright that seeks to preserve public access to ideas.

In the first place, the takings by CCC from the Red Book are of virtually the entire compendium. This is not an

---

the extent of the copyright owner's monopoly -- from how large an area of activity did Congress intend to allow the copyright owner to exclude others?"); *Kern River Gas Transmission Co. v. Coastal Corp.*, 899 F.2d 1458, 1464 (5th Cir.) *cert. denied*, 498 U.S. 952 (1990) ("To extend protection . . . would be to grant Kern River a monopoly of the idea for locating a proposed pipeline in the chosen corridor, a foreclosure of competition that Congress could not have intended to sanction through copyright law . . . ."). *See also Nash v. CBS, Inc.*, 899 F.2d 1537, 1540-42 (7th Cir. 1990); *Lotus Dev. Corp. v. Paperback Software Int'l.*, 740 F. Supp. 37, 60-61 (D. Mass. 1990); *Nimmer*, § 13.03[B] at 13-78-80; Patry, *supra*, at 314-317.

Indeed, courts have consistently ruled in a manner that supports the distinction made in *Kregos*. *Compare Baker v. Selden*, 101 U.S. 99 (1880), and *Kern River*, *supra*, (copyright protection denied, based on merger doctrine, respectively to a system of double entry bookkeeping and the designation of the best available pipeline route from Wyoming to California), *with Eckes*, *supra*, and *Key*, *supra*, (granting protection to the identification of premium baseball cards and business establishments likely to be of interest to the Chinese-American community).

instance of copying of a few entries from a compilation. This copying is so extensive that CCC effectively offers to sell its customers Maclean's Red Book through CCC's data base. CCC's invocation of the merger doctrine to justify its contention that it has taken no protectible matter would effectively destroy all protection for Maclean's compilation.[26]

Secondly, the valuations copied by CCC from the Red Book are not ideas of the first, building-block, category described in *Kregos*, but are rather in the category of approximative statements of opinion by the Red Book editors. To the extent that protection of the Red Book would impair free circulation of any ideas, these are ideas of the weaker category, infused with opinion; the valuations explain nothing, and describe no method, process or procedure. Maclean Hunter makes no attempt, for example, to monopolize the basis of its economic forecasting or the factors that it weighs; the Red Book's entries are no more than the predictions of Red Book editors of used car values

---

[26] In this circuit, consideration of the merger doctrine takes place in light of the alleged copying to determine if infringement has occurred, rather than in analyzing the copyrightability of the original work. *Kregos*, 937 F.2d at 705; *Durham Industries, Inc. v. Tomy Corp.*, 630 F.2d 905, 916 (2d Cir. 1980). This approach is applauded by Nimmer as the "better view." 13.03[B] at 13-76 to -78. As we noted in *Kregos*, "[a]ssessing merger in the context of alleged infringement will normally provide a more detailed and realistic basis for evaluating the claim that protection of expression would inevitably accord protection to an idea." *Kregos*, 937 F.2d at 705. In the instant case, for example, it is of consequence that we are confronted with wholesale copying *of* a compilation rather than some more limited copying *from* a compilation.

for six weeks on a rough regional basis. As noted above, Red Book specifies in its introduction that "[y]ou, the subscriber, must be the final judge of the actual value of a particular vehicle. Any guide book is a supplement to and not a substitute for expertise in the complex field of used vehicle valuation." This language is remarkably similar to our observation in *Kregos*, that the author "has been content to select categories of data that he obviously believes have some predictive power, but has left it to all sports page readers to make their own judgments as to the likely outcomes from the sets of data he has selected." 937 F.2d at 707.

The balancing of interests suggested by *Kregos* leads to the conclusion that we should reject CCC's argument seeking the benefit of the merger doctrine.[27] Because the ideas contained in the Red Book are of the weaker, suggestion-opinion category, a withholding of the merger doctrine would not seriously impair the policy of the copyright law that seeks to preserve free public access to ideas. If the public's access to Red Book's valuations is slightly limited by enforcement of its copyright against CCC's wholesale copying, this will not inflict injury on the opportunity for public debate, nor restrict access to the kind of idea that illuminates our understanding of the phenomena

---

[27] As Nimmer points out, "There can be no First Amendment justification for the copying of expression along with idea simply because the copier lacks either the will or the time or energy to create his own independently evolved expression. The first amendment . . . does not offer a governmental subsidy at the expense of authors whose well-being is also a matter of public interest." *Nimmer*, *supra*, § 1.10[D] at 1-98 to -98.1.

that surround us or of useful processes to solve our problems.[28] In contrast, if the merger doctrine were applied so as to bar Maclean's enforcement of its copyright against CCC's wholesale takings, this would seriously undermine the protections guaranteed by § 103 of the Copyright Act to compilations that employ original creation in their selection, coordination, or arrangement. It would also largely vitiate the inducements offered by the copyright law to the makers of original useful compilations.

3. *Public domain.* We disagree also with the district court's ruling sustaining CCC's affirmative defense that the Red Book has fallen into the public domain. The district court reasoned that, because the insurance statutes or regulations of several states establish Red Book values as an alternative standard, *i.e.*, by requiring that insurance payments for total losses be at least equal either to Red Book value or to an average of Red Book and Bluebook values (unless another approved valuation method is employed),[29] the Red Book has passed into the public domain. The argument is that the public must have free access to the

---

[28] Others, including CCC, remain free to value used cars and to profit from their valuations. They are barred only from wholesale copying of what is original to the authors of the Red Book. As the Supreme Court said in *Mazer v. Stein*, 347 U.S. 201 (1954), "respondents may not exclude others from using statuettes of human figures in table lamps; they may only prevent use of copies of their statuettes as such or as incorporated in some other article." 347 U.S. at 218.

[29] See N.J. Admin. Code 11:3-10.4 (1988); 11 N.Y. Admin. Code § 216.7(c) (1990).

content of the laws that govern it; if a copyrighted work is incorporated into the laws, the public need for access to the content of the laws requires the elimination of the copyright protection.

No authority cited by CCC directly supports the district court's view. It relied on *Building Officials & Code Adm. v. Code Tech. Inc.*, 628 F.2d 730 (lst Cir. 1980) ("BOCA"), which the Magistrate Judge found "virtually indistinguishable" from our case. Although the First Circuit Court of Appeals, in *BOCA*, indeed expressed sympathy with the arguments here advanced by CCC, its ruling is not a holding to that effect. The Court of Appeals merely vacated a preliminary injunction, expressing doubts as to the plaintiff copyright holder's likelihood of success, and remanding for a full hearing on whether the plaintiff had lost its copyright protection by reason of the adoption of its previously protected work (a construction code) as part of the laws of Massachusetts.

We are not prepared to hold that a state's reference to a copyrighted work as a legal standard for valuation results in loss of the copyright. While there are indeed policy considerations that support CCC's argument, they are opposed by countervailing considerations. For example, a rule that the adoption of such a reference by a state legislature or administrative body deprived the copyright owner of its property would raise very substantial problems under the Takings Clause of the Constitution. We note also that for generations, state education systems have assigned books under copyright to comply with a mandatory school curriculum. It scarcely extends CCC's argument to require

that all such assigned books lose their copyright -- as one cannot comply with the legal requirements without using the copyrighted works. Yet we think it unlikely courts would reach this conclusion. Although there is scant authority on CCC's argument, Nimmer's treatise opposes such a suggestion as antithetical to the interests sought to be advanced by the Copyright Act. *See Nimmer* § 5.06[C] at 5-60.[30]

Conclusion

Because Maclean has demonstrated a valid copyright, and an infringement thereof, we direct the entry of judgment in Maclean's favor. We remand to the district court for further proceedings.

---

[30] Nimmer argues that the adoption of a private work into law might well justify a fair use defense for personal use, but should not immunize a competitive commercial publisher from liability since this would "prove destructive of the copyright interest in encouraging creativity in connection with the increasing trend toward state and federal adoptions of model codes." *Nimmer*, § 5.06[C] at 5-60.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 5th day of December one thousand nine hundred and ninety-four.

PRESENT: HONORABLE AMALYA L. KEARSE
HONORABLE LAWRENCE W. PIERCE
HONORABLE PIERRE N. LEVAL,
Circuit Judges.

CCC INFORMATION SERVICES, INC.,
Plaintiff-Appellee,

v. 93-7687

MACLEAN HUNTER MARKET REPORTS, INC.,
Defendant-Appellant,

CREATIVE AUTOMATION CO.,
Defendant.

Appeal from a judgment of the United States District Court for the District of Connecticut.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ORDERED, ADJUDGED and DECREED that the judgment of the District Court is reversed and the action be and it hereby is remanded to the said District Court for further proceedings in accordance with the opinion of this Court and with instructions to enter judgment in favor of defendant on its counterclaims alleging copyright infringement.

GEORGE LANGE III, Clerk
By:
/s/ Edward J. Guardaro

Edward J. Guardaro
Administrative Attorney

A TRUE COPY
GEORGE LANGE III, CLERK

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

GEORGE LANGE III
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 10th day of March one thousand nine hundred and ninety-five.

CCC INFORMATION SERVICES, INC.,
Appellee

v. Dkt No: 93-7687

MACLEAN HUNTER MARKET REPORTS, INC.,
Appellant

A petition for rehearing containing a suggestion that the action be *reheard* in banc having been filed herein by the appellee CCC INFORMATION SERVICES, INC.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

GEORGE LANGE III, Clerk

By: /s/ Carolyn Clark Campbell
Carolyn Clark Campbell,
Chief Deputy Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

CCC INFORMATION SERVICES, INC.,	)	
Plaintiff	)	
vs.	)	Civil No. 2:91CV00264 (AHN)
MACLEAN HUNTER MARKET REPORTS, INC. and CREATIVE AUTOMATION CO.,	)	
Defendants	)	

RULING ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON COPYRIGHT CLAIMS (DOC.NO.111) AND DEFENDANT'S (MACLEAN HUNTER MARKET REPORTS, INC.) MOTION FOR PARTIAL SUMMARY JUDGMENT ON COPYRIGHT ISSUES (DOC. NO. 136)

Plaintiff CCC Information Services, Inc. ("CCC"), a company in the business of providing local market automobile valuation information to, *inter alia*, insurers and financial institutions, brought this action under federal copyright law, 17 U.S.C. § 101 *et seq.*, for declaratory

judgment of invalidity and noninfringement of copyrights held by defendant Maclean Hunter Market Reports, Inc. ("Maclean Hunter") in the "Automobile Red Book Official Used Car Valuations" ("Red Book"). Maclean Hunter counterclaimed under 17 U.S.C. § 501 *et seq.* for infringement of asserted exclusive rights to the Red Book, requesting injunctive relief and monetary damages. CCC interposed twelve affirmative defenses to the counterclaim. CCC moves for summary judgment on its complaint for declaratory judgment and on Maclean Hunter's counterclaim. Maclean Hunter also moves for summary judgment on CCC's complaint and, additionally, on CCC's twelve affirmative defenses.

Summary judgment may only be granted if "there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law". Fed. R. Civ. P., Rule 56(c). The court's function is not to resolve material fact issues, but simply to determine if such issues exist, *Schering Corp. v. Home Ins. Co.*, 712 F.2d 4 (2 Cir. 1983), and as long as they do not, summary judgment may be granted. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-248 (1986). Summary judgment may be an appropriate disposition in copyright cases where there is undisputed direct evidence of copying and infringement may be determined as a matter of law. *Rogers v. Koons*, 960 F.2d 301, 307 (2 Cir.), *cert. denied*, 113 S.Ct 365 (1992). For example, if the only similarity between two works is of noncopyrightable elements, summary judgment may be granted. *Arica Institute, Inc. v. Palmer*, 970 F.2d 1067, 1072 (2 Cir. 1992) (citations omitted).

The following facts are evident from the well-developed pre-trial record and are not disputed by the parties. Maclean Hunter and its predecessors have published the Red Book since 1911. The Red Book lists valuations of domestic and imported used cars and trucks that are seven years old or less in the form of tables of data identifying vehicles by make, model, model number, body style, engine and transmission. The automobile manufacturers are listed alphabetically by year within each section and the models are listed chronologically within each manufacturer's section, beginning with the latest model year. The Red Book provides the average wholesale value, average retail value and average finance (loan) value for each vehicle, and also contains separate sections on selections of options, option valuations and mileage categories which customers use to adjust vehicle valuations according to the mileage and options on particular vehicles. The listed cars and trucks comprise an estimated 98% of all used vehicles available. Maclean Hunter maintains a computerized program of its valuations which it revises for the publication of each Red Book.

Maclean Hunter arrives at the valuations and selections contained in the Red Book by gathering and reviewing information from the following sources: (1) discussions with vehicle sales personnel, dealers and manufacturers' representatives; (2) weekly reports on automotive production figures; (3) used car auction reports and attendance at auctions; (4) industry publications, including an automotive yearbook, statistics and valuations in other guidebooks; and (5) research into economic trends and the automotive industry. Maclean Hunter represents that all information in

the Red Book "has been obtained from reliable sources", "has been most carefully compiled" and "is believed to be correct". CCC's Memorandum in Support of its Motion for Summary Judgment ("CCC Mem."), Exh. C.

The Red Book is currently published eight times per year for three different regions of the United States (Regions A, B and C) and for the State of Wisconsin. Annual subscriptions to the Red Book approximate fifty thousand and an additional fifteen or twenty thousand customers request single copies. Customers are predominantly insurance companies, banks and lending institutions, new and used car dealers, taxing authorities, departments of welfare and public libraries. These entities primarily use the Red Book to place a dollar value on automobiles for sale and purchase transactions, financing, insurance settlements and tax assessments.

Each edition of the Red Book also contains some advertising for other Maclean Hunter publications and explanatory text, including the following prefatory language to describe the contents and purpose of the Red Book:

> "Valuation are based on a thorough study of the used car market . . .
>
> Red Book contains the publishers' projected estimates of used vehicle values. While we consult various market sources for data, including actual prices paid for comparable vehicles in the market place, we do not report actual market prices because we believe them to be out of date and invalid for the future period we are

valuing. Rather, as a guide-book, we project to the best of our ability vehicle values for the future period(s) covered by each edition.

You, the subscriber, must be the final judge of the actual value of a particular vehicle."

Id.

Since about 1914, each edition of the Red Book has been registered with the U.S. Copyright Office and has included a copyright notice. Maclean Hunter's Appendix in Support of Motion for Partial Summary Judgment on the Copyright Issues ("Def. App."), A-882. Since 1983, each Red Book has contained a written warning against any form of reproduction, including by computer or electronics.

The Red Book is cited in the statutes and regulations of many states. Connecticut, New Jersey, New York and Pennsylvania have each designated the Red Book as an authorized source for calculating "total loss" valuation for insurance purposes. Connecticut specifically requires an insurer, when calculating the value of a vehicle declared to be a total loss, to use not less than the average of the retail values of the insured vehicle as listed in the National Automobile Dealers Association ("NADA") Official Used Car Guide and one other approved source. Conn. Gen. Stat. § 38a-353. As of December 1992, Red Book, CCC's Local Market Valuation Service (described below) and a third valuation guide, Automatic Data Processing Autotrak, are approved second sources for calculating the value of a damaged vehicle which has been declared a constructive total

loss. State of Connecticut Insurance Department Bulletin No. IC-10. Additionally, other states explicitly permit or require the use of Red Book valuations for other purposes, such as for tax assessment. See CCC Mem., Exh. E.

CCC provides current local market vehicle valuation calculations to insurance companies and other businesses requiring up-to-date valuations of vehicles. CCC provides over 100,000 computer-generated calculations based on vehicle valuations per month. One service offered by CCC is Computerized Valuation Service ("CVS") (described above as Local Market Valuation Service). CVS provides valuations of total loss vehicles using CCC's local market database which is formulated from CCC's own information-gathering resources. CCC field representatives visit automobile dealerships, collect information about inventory and sales and then develop vehicle descriptions. CCC then produces individualized local market reports for insurance clients listing vehicle valuations and comparable vehicles within the requested price range. CCC provides its CVS customers with the option of receiving a Red Book figure to compare with the CVS valuation result. CVS is employed in those states which do not specify or require a particular source for valuation information.

In Connecticut, New Jersey, New York and Pennsylvania, which require use of "official" valuation sources for calculating insurance total losses, CCC offers a service called VINguard Valuation Service ("VVS") to provide total loss calculations and valuation averages. While VVS is based on CCC's own vehicle descriptions and formatted database, in producing the service, CCC uses

numerical data from the Red Book and the NADA Official Used Car Guide to calculate vehicle valuations. Red Book information contained in the VVS database includes retail and wholesale valuations of used vehicles and valuations for certain optional equipment and mileage adjustments. Def. App. A-274 to A-277, A-458(e)-(h) and A-758 to A-760. CCC's "Price File Update Listings" contain automobile valuations for Regions A and B. Def. App. A-106 to A-225. CCC has a subscription to the Red Book.

The parties' relationship began in 1981 when CCC first pursued a license from Maclean Hunter's predecessor, National Market Reports ("National"), to use Red Book valuations in computer tape form. In 1982, CCC proposed to National that they enter into a formal written agreement whereby National would grant to CCC an exclusive license to use Red Book data in exchange for an initial fee of $500. No such agreement was reached. Discussions ceased and, in July 1983, believing that CCC was making unauthorized use of its proprietary vehicle valuations, National sued CCC in the U.S. District Court for the Northern District of Illinois for infringement of three federally registered copyrights dated March, 1983. The suit was settled two weeks later pursuant to a consent agreement wherein CCC agreed not to employ or utilize National's trademarks, including the designations and trademarks "Red Book" and "Red Book Price". Each party released the other from all actions or claims arising out of the subject matter of the complaint.

After the 1983 settlement, the parties continued to dispute CCC's use of Red Book data and the occurrence of any impermissible appropriation. In 1990, CCC offered to pay

$650,000 for a license from Maclean Hunter to use the Red Book computer tapes. Maclean Hunter rejected the offer. In another effort to obtain Red Book data in computerized form, CCC made a bid for the assets of a company called Statistical Tabulating Company ("Stat:Tab") in Stat:Tab's 1990 bankruptcy proceeding. Stat:Tab enjoyed an exclusive license with Maclean Hunter and a non-exclusive license with NADA to produce VISTA, a software program averaging valuations published in the Red Book and the NADA guide. The bankruptcy court ultimately approved a sale of Stat:Tab's assets, including VISTA, to defendant Creative Automation Company ("Creative"). Creative offered VISTA until December 1991.

CCC alleges that the Red Book's copyrights and Creative's licenses are invalid and unenforceable because the Red Book contains unprotected statements of fact and because its selection and organization are obvious and unoriginal. CCC agrees that Maclean Hunter gathers information from various sources and the Red Book is based in part on Red Book editors' individual judgment and experience, but submits that the resultant valuations are mere interpretations of facts, items having an "objective reality" which are not protected by copyright.

Maclean Hunter's counterclaim for copyright infringement alleges that CCC publishes and commercially markets data copied from works protected by copyright. Maclean Hunter maintains that the valuations and selections regarding vehicles, options, mileage and regions are its original creations insofar as they are matters of opinion and judgment. Maclean Hunter also asserts that the valuations

cannot be "discovered facts" because there is no evidence that the data exists elsewhere. Maclean Hunter seeks an order permanently enjoining CCC from infringing copyrights of Red Book and from publishing, selling, marketing or otherwise disposing of any work infringing Red Book's copyrights, and requiring CCC to produce all infringing copies for destruction.

CCC asserts the following affirmative defenses to Maclean Hunter's claim of infringement: (1) CCC used the Red Book consistent with its intended purpose; (2) CCC used the Red Book such as to constitute a "fair use" under 17 U.S.C. § 107; (3) the Red Book is in the public domain; (4) the Red Book contains numerical statements of fact which are not copyrightable material; (5) the Red Book is not the subject of valid copyright registration; (6) Maclean Hunter's copyrights are unenforceable because of copyright misuse; (7) Maclean Hunter has waived any right to claim infringement against CCC because it knew of and condoned CCC's use of alleged copyrighted material; (8) Maclean Hunter is estopped from asserting infringement against CCC because it permitted CCC to continue its business; (9) Maclean Hunter is guilty of laches; (10) Maclean Hunter released any claim of infringement in the 1983 settlement agreement; (11) the statute of limitations bars infringement claims more than three years old; and (12) Maclean Hunter is barred by the doctrine of res judicata. CCC's Reply to Maclean Hunter's Counterclaim.

To prove a claim of copyright infringement, Maclean Hunter must establish two elements: (1) ownership of a valid copyright; and (2) copying of copyrightable elements of the

work. *Key Publications, Inc. v. Chinatown Today Pub. Enterprises, Inc.*, 945 F.2d 509, 514 (2 Cir. 1991) (citation omitted). The Copyright Act of 1976 makes a certificate of copyright registration prima facie evidence of the valid ownership of a copyright, see 17 U.S.C. § 410(c), although that presumption of ownership may be rebutted by a showing that the registered works are not copyrightable. *Rogers v. Koons*, *supra*, 960 F.2d at 306. Indeed, validity will not be assumed where other evidence in the record casts doubt on the copyrightable nature of the work. *Merritt Forbes & Co. Inc. v. Newman Inv. Securities, Inc.*, 604 F. Supp. 943, 948 (S.D.N.Y. 1985). To prove copying, a plaintiff must establish that the defendant had "access" to the copyrighted work and that defendant's work is "substantially similar" to plaintiff's work. *Walker v. Time Life Films, Inc.*, 784 F.2d 44, 48 (2 Cir.), *cert. denied*, 476 U.S. 1159 (1986). See also *Manufacturers Technologies, Inc. v. Cams, Inc.*, 706 F. Supp. 984, 990 (D. Conn. 1989) (Daly, J.).

Both elements necessary to establish copyright infringement are disputed by CCC and Maclean Hunter. CCC's position is that Maclean Hunter's copyrights are not valid because none of the Red Book is eligible for copyright protection but, in any event, CCC uses noncopyrightable material in its valuation business. With respect to the first element, because the Red Book contains some foreword text and advertisements containing original material, it is, considered as a whole, subject to a valid copyright. *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*, ___ U.S. ___, 111 S. Ct. 1282 (1991).

The real question is whether Maclean Hunter has proved the second element. Defendant asserts that everything plaintiff has adopted from the Red Book is copyrightable. CCC states that perhaps, at the very most, Maclean Hunter's copyrights extend only to the selection and arrangement of valuation data in the Red Book, but because CCC does not copy any selection or arrangement from the Red Book, its use of Red Book information is not an infringing use. Here, CCC's "copying" of the Red Book's valuation data is undisputed. CCC subscribes to the Red Book and openly admits its use of Red Book valuations to generate the VVS product and its offer to provide CVS customers with Red Book data for comparative purposes. Therefore, the first copyright issue presented is whether the material from the Red Book used by CCC merits copyright protection. If this material is properly protected by copyright law, the next level of inquiry addresses the existence of any cognizable defense to the copying, thereby precluding a finding of infringement.

To qualify for copyright protection, a work must be original to its author. See *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 547-549 (1985). Originality is a constitutional and statutory requirement. See United States Constitution, Article I, Section 8, Clause 8 (Congress has the power to "secur[e] for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries"); Copyright Act of 1976, 17 U.S.C. § 101 *et seq*. Copyright confers monopolistic rights to publish, copy and distribute an original work. *Harper & Row, supra*, 471 U.S. at 546-547. For example, a copyright holder has the right to grant or refuse to grant a license to

someone who seeks use of the copyrighted material. These rights are intended to encourage creative activity and promote the dissemination of ideas. *Id.* at 556.

Pursuant to the Copyright Act, copyright protection does not extend to "any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work". 17 U.S.C. § 102(b). In this way, copyright law does not restrict freedom of speech because it protects only the form of expression and not the idea expressed. *Laureyssens v. Idea Group, Inc.*, 964 F.2d 131, 141 (2 Cir. 1992) (citations omitted). Indeed, this "idea-expression dichotomy" is at the core of copyright law. *Manufacturers Technologies*, 706 F. Supp. at 993. As a matter of law, infringement will not be found where the similarity between two works is that of an abstract idea, rather than the expression of that idea. *Eckes v. Card Prices Update*, 736 F.2d 859, 862 (2 Cir. 1984).

Moreover, facts and interpretations of facts are not copyrightable. *Merritt Forbes*, *supra*, 604 F. Supp. at 950 (citing 1 Nimmer on Copyright, § 2.11[A]). And, because copyright is limited to expression, that aspect of a work which displays the stamp of originality, an original expression of facts is copyrightable even where the facts themselves are not. *Arica*, *supra*, 970 F.2d at 1075. Copyright does not prevent copying of those elements of a work that are not original such as "quotations borrowed under the rubric of fair use from other copyrighted works, facts, or materials in the public domain -- as long as such

use does not unfairly appropriate the author's original contributions". *Harper & Row, supra*, 471 U.S. at 548.

In a landmark copyright decision, the Supreme Court explained that "[o]riginal, as the term is used in copyright, means only that a work is independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity". *Feist, supra*, 111 S. Ct. at 1287 (citing 1 M. Nimmer & D. Nimmer, Copyright §§ 2.01[A], [B] (1990)). Indeed, the Court previously defined author as "originator" or one to whom any "physical rendering of the fruits of creative intellectual or aesthetic labor" owes its origin. *Goldstein v. California*, 412 U.S. 546, 561 (1973). Original works of authorship warranting copyright protection may be "fixed in any tangible medium of expression", including literary works. 17 U.S.C. § 102(a). The Copyright Act broadly defines literary works as "works, other than audiovisual works, expressed in words, numbers, or other verbal or numerical symbols or indicia . . .", 17 U.S.C. § 101, which includes catalogs, directories and similar factual, reference or instructional works as well as compilations of data. *Merritt Forbes, supra*, 604 F. Supp. at 948 (citing House Report on the Copyright Act of 1976, Report No. 94-1476, U.S. Code Cong. & Admin. News 1976 at 5659, 5666). It appears then that the Red Book qualifies as a literary work.

No court in this jurisdiction has addressed the issue of whether vehicle valuations are the proper subject for copyright protection. The Eastern District of Virginia considered an analogous case, *N.A.D.A Services Corp. v. Business Data of Virginia, Inc.*, 651 F. Supp. 44 (E.D. Va.

1986), in which NADA's claim for copyright infringement failed. Defendant Business Data of Virginia ("BDV") used copies of the NADA Guides to assess vehicle values and prepare documents for the Virginia government to use for personal tax return purposes. BDV produced tapes which were essentially computerized versions of the factual information contained in the NADA Guides. The court found that, had BDV sold its tapes, it would most likely have constituted infringement of NADA's copyright in the NADA Guides; however, the court concluded instead that NADA was trying to protect BDV's use of the factual information contained in the Guides. But cf. *NADA Services Corp. v. CCC Information Services, Inc.*, No. 91 C 4593, 1991 WL 287961, at *2 (N.D. Ill. Nov. 15, 1991) (without reaching the merits, the court indicated that NADA had "some likelihood of prevailing on its theory the numbers themselves are protectable under the Copyright Act").

The Supreme Court's decision in *Feist* also is instructive. Notwithstanding the extremely low level of creativity required for copyright protection, the Court held that the names, towns and telephone numbers listed in a combined white and yellow pages telephone directory did not warrant copyright protection. Because the information had an existence apart from the directory and did not owe its origin to the publisher, the Court found that it was simply a collection of uncopyrightable facts. *Feist* soundly rejected the once fashionable "sweat of the brow" doctrine, see generally *Jeweler's Circular Publishing Co. v. Keystone Publishing Co.*, 281 F. 83 (2 Cir. 1922) (outlining now-repudiated sweat of the brow test) which rewarded the hard work that went into collecting and compiling facts.

Stating that there is "nothing remotely creative about arranging names alphabetically in a white pages directory", the *Feist* Court denied copyright protection to the directory noting that "copyright rewards originality, not effort". Also illustrative is *Kregos v. Associated Press*, 937 F.2d 700 (2 Cir. 1991), where the Second Circuit held that statistics devised from information concerning past performances of pitchers were not eligible for copyright protection. Like the Red Book, the statistics were calculated from underlying data and while they were not themselves "discovered facts", they were generated from discovered facts.

Maclean Hunter has not persuasively demonstrated that the values published in the Red Book are anything more than interpretations or analyses of factual information which have been gathered by the Red Book staff. Clearly, the valuations embody an idea -- that of the ability to place a dollar value on a used car or truck -- but they do not constitute an original expression of that idea. In view of the undisputed evidence of other documents and factual sources upon which the Red Book is based, the valuations certainly appear to be nothing more than unprotected derivations and analyses of preexisting material. See, e.g., *Merritt Forbes*, *supra*, 604 F. Supp. at 952 (analyzing originality of bond underwriting documents). While Maclean Hunter may have been the first to discover and report this material, the material does not "owe its origin" to Maclean Hunter. *Feist*, *supra*, 111 S. Ct. at 1296 (citation omitted). Therefore, the originality requirement has not been satisfied with respect to the Red Book valuations.

Originality may also be found in the selection and ordering of particular facts or elements. *Financial Information, Inc. v. Moody's Investors Service, Inc.*, 808 F.2d 204 (2 Cir. 1986), *cert. denied*, 484 U.S. 820 (1987). In this way, a factual compilation, in contrast to solitary facts, is eligible for copyright if it features an original selection or arrangement of facts, but the copyright may not extend beyond the elements which originated with the compiler. *Feist*, *supra*, 111 S. Ct. at 1290. In order for a work to qualify as a copyrightable compilation, three elements must be present: (1) the collection and assembly of pre-existing material, fact or data; (2) the selection, coordination or arrangement of those materials; and (3) the creation, by virtue of the particular selection, coordination or arrangement, of an "original" work of authorship. *Id.* at 1293. Despite widespread recognition of compilation copyright, the Supreme Court has warned that a copyright in a factual compilation is "thin" and denied protection to the arrangement of information in the *Feist* directory. *Id.* at 1289. But cf. *Key Publications*, *supra*, 945 F.2d at 514 (agreeing with *Feist* that a copyright in a factual compilation is thin, but stressing that it is not "anorexic", the Second Circuit distinguished *Feist* and held that the arrangement of a yellow pages directory for Chinese-American businesses involved "de minimis" creativity in deciding which names and categories to include, and thus plaintiff's copyright was valid).

Maclean Hunter asserts that CCC copies not only the actual contents of the Red Book, but also their selection and arrangement. In this regard, Maclean Hunter points out that CCC uses Red Book's material on options and also arranges

vehicle information into Regions A and B. Whether option information and column labels "Region A" and "Region B" constitute selection and arrangement is unclear, but accepting Maclean Hunter's argument as true for purposes of this discussion, there still would be no copyright infringement because the Red Book's selection and arrangement of vehicle information are not original. The valuation data included in the Red Book is a logical response to the needs of the vehicle valuation market. Because Maclean Hunter intends for the Red Book to be as comprehensive as possible and readily admits that it contains data on nearly all used cars and trucks available, the author's selection of information "lacks the modicum of creativity necessary to transform mere selection into copyrightable expression". *Feist*, *supra*, 111 S. Ct. at 1296. Maclean Hunter does not exercise sufficient judgment and discretion in determining which items to list in the Red Book, critical elements to compilation copyright. See, e.g., *Financial Information*, *supra*, in which the Second Circuit affirmed the district court's finding, after trial and remand, that a financial publisher's "Daily Bond Cards" (print-outs of municipal bond redemption information) were not original works of authorship. The cards did not qualify for copyrightable compilation based on the format utilized because little independent creation went into "filling in" five facts on each card. *Id.* at 207. But cf. *Eckes v. Card Prices Update*, *supra*, 736 F.2d at 863 (due to evidence that plaintiffs "exercised selection, creativity and judgment in choosing among the 18,000 or so different baseball cards in order to determine which were the 5,000 premium cards" to list in a guidebook, the guide merited protection under the copyright laws on the basis of original compilation); *Kregos*, *supra*,

937 F.2d at 704 (in choosing nine items for a pitching form out of the universe of known facts available, which was "considerably greater" than nine, plaintiff displayed requisite selectivity).

The arrangement of the Red Book is rather mechanistic. The alphabetical and chronological display of information is designed for convenience, to make it as "[e]asy as possible to find a car". CCC Mem., Exh. C at 142-143. Indeed, like the telephone book's ordering of facts in *Feist*, the format of the Red Book is a "convention". *Victor Lalli Enterprises, Inc. v. Big Red Apple, Inc.*, 936 F.2d 671 (2 Cir. 1991). In *Victor Lalli*, defendant's use of charts tracking the historical record of winning numbers at local race tracks was not infringing because the charts did not feature original selection, coordination or arrangement insofar as they were "purely functional grids . . . offer[ing] no opportunity for variation". *Id.* at 673. Additionally, the *Kregos* court denied copyright protection to the arrangement of selected statistics, describing the pitching form as "garden-variety" based on its use of columns and categorical and chronological organization. *Kregos*, *supra*, 937 F.2d at 705.

The pre-trial evidentiary record here indicates that the information contained in the Red Book is the product of research, calculation and compilation. Indeed, it is obvious that a fair amount of effort and labor goes into the publication of each Red Book; however, Maclean Hunter's toil in producing the Red Book is irrelevant to the question of whether the work is original enough to qualify for copyright protection. The undisputed facts indicate that

copyright law neither protects the Red Book's valuations nor its selection and arrangement of data, all of which may be freely used by subsequent authors. *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 979 (2 Cir.), *cert. denied*, 449 U.S. 841 (1980). Therefore, CCC's incorporation of Red Book data into its own valuation reports does not constitute infringement.

The copyright doctrine of merger further precludes a finding of infringement. The merger doctrine provides that expression of an idea is not protected where there is only one or so few ways of expressing an idea that protection of the expression would effectively protect the idea itself. *Computer Associates International, Inc. v. Altai, Inc.*, 982 F.2d 693, 707-708 (2 Cir. 1992) (citations omitted). This doctrine determines whether actionable infringement has occurred, not whether a copyright is valid, and is designed to prevent monopolies over ideas. *Kern River Gas Transmission Co. v. Coastal Corp.*, 899 F.2d 1458, 1463 (5 Cir.), *cert. denied*, 498 U.S. 952 (1990). The Second Circuit has instructed that application of the doctrine of an idea merging with its expression depends on the level of abstraction at which the idea is formulated, stating:

> "As long as selections of facts involve matters of taste and personal opinion, there is no serious risk that withholding the merger doctrine will extend protection to an idea . . . . However, where a selection of data is the first step in an analysis that yields a precise result or even a better-than-average probability of some result, protecting the 'expression' of the selection would clearly risk protecting the idea of the analysis."

Kregos, *supra*, 937 F.2d at 707.

Here, Maclean Hunter represents that the information contained in the Red Book is believed to be correct and titles the guide "Official Used Car Valuations". CCC Mem., Exh. C. Moreover, regulations of the federal government and more than half of the states in this country reference the Red Book as an official source of vehicle valuations. CCC Mem., Exh. E. Maclean Hunter has taken steps to have the Red Book designated as an official valuation guide for insurance purposes in certain states. CCC Mem., Exh. 2 at 41-65. Based on this evidence, it appears that Maclean Hunter's selection of information used to formulate used car and truck values is designed to yield a rather precise result and the numerical data is "necessarily incidental" to the idea of valuing used vehicles. *Altai*, *supra*, 982 F.2d at 707. Also, practically speaking, there really is only one accessible way to express the idea of an item's value -- through the use of a number. Maclean Hunter does not deny this practicality. CCC Mem., Confidential Exh. O at 217. See generally *Matthew Bender & Co., Inc. v. Kluwer Law Book Publishers, Inc.*, 672 F. Supp. 107 (S.D.N.Y. 1987) (application of merger doctrine to charts of information relating to personal injury and wrongful death awards and settlements due to limited number of ways to present the information).

Next, CCC's affirmative defenses to Maclean Hunter's counterclaim of infringement are discussed to the extent they are not repetitive of the foregoing. CCC submits that even if its use of the Red Book were otherwise deemed an infringing use, it prevails on a "fair use" defense pursuant to

17 U.S.C. § 107. Fair use is a privilege to use copyrighted material in a "reasonable manner" without the owner's consent when certain circumstances exist. The fair use doctrine is designed to balance the "exclusive right of a copyright holder with the public's interest in dissemination of information affecting areas of universal concern . . . ." *Meeropol v. Nizer*, 560 F.2d 1061, 1068 (2 Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978). While the doctrine is not "a license for corporate theft", *Iowa State Univ. Research Foundation, Inc., v. American Broadcasting Companies, Inc.*, 621 F.2d 57, 61 (2 Cir. 1980), it does permit use of a copyrighted material for nonprofit educational purposes such as criticism, comment, news, reporting, teaching, scholarship and research. 17 U.S.C. § 107. Determining the applicability of the fair use defense requires analysis and "equitable consideration", *Financial Information, Inc. v. Moody's Investors Service, Inc.*, 751 F.2d 501, 508 (2 Cir. 1984), of the following four factors:

> "(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purpose;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work."

17 U.S.C. § 107(1)-(4).

If the use is commercial, there is a presumption against fair use. *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984), *rehearing denied*, 465 U.S. 1112 (1984). There is no question that CCC's use is commercial, and presumptively unfair. Plaintiff submits that any initial presumption against fair use is rebutted by the fact that it is required to use Red Book information in providing a product to its customers that complies with state statutes and regulations. This use, however, does not serve the doctrine's purpose of fostering creativity. *Iowa State University Research Foundation*, 621 F.2d at 60.

The second factor -- the nature of the copyrighted material -- weighs against the asserted claim of fair use given the for-profit purpose of the Red Book and the similarly noncreative and commercial manner in which CCC uses the Red Book. *Financial Information*, 751 F.2d at 509. Had CCC intended to put Red Book data to an artistic purpose entirely unrelated to the vehicle valuation business or offered some criticism of or comment upon the Red Book, its assertion of fair use might be more compelling, but in these circumstances, it sounds a bit like the pot calling the kettle black. *Id.*

The third factor -- the amount and substantiality of the copyrighted material copied -- also weighs against fair use. CCC inputs Red Book's retail, wholesale, option and mileage valuations into its computer database of VVS reports, material which Maclean Hunter characterizes as the "most important" part of the work. CCC characterizes the material as a "small fraction" of its total output. But even if CCC's use is in fact *de minimis*, "no plagiarist can excuse

the wrong by showing how much of his work he did not pirate", *Harper & Row, supra*, 471 U.S. at 565 (quoting *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 56 (2 Cir.) *cert. denied*, 298 U.S. 669 (1936)).

The fourth fair use factor -- the effect of the use upon the potential market for or value of the copyrighted work -- is the single most significant element of fair use inquiry. *Harper & Row, supra*, 471 U.S. at 566. "Fair use . . . is limited to copying by others which does not materially impair the marketability of the work which is copied". *Id.* at 566-567 (quoting 1 Nimmer § 1.10[D] at 1-87). The pre-trial record here evidences cancellations of subscriptions to the Red Book by former Maclean Hunter customers who decided to instead use CCC's services. Def. App. A-889-902. To negate fair use, a defendant need only show that if plaintiff's use became widespread, it would adversely affect the *potential* market for the copyrighted work. *Sony Corp. of America*, 464 U.S. at 451. Maclean Hunter's showing of adverse effect on the *existing* market (and presumably the potential market as well) for the Red Book is indeed a persuasive barometer of unfair use. But cf. *N.A.D.A. Services, supra*, 651 F. Supp. at 48 (fair use found where no evidence of market impairment).

CCC also asserts that its use of the Red Book is permissible under the "public domain" doctrine. Laws are in the public domain and, as such, are uncopyrightable. *Banks v. Manchester*, 128 U.S. 244 (1888). Due process requires that laws be accessible and available to the public and hence not be subject to copyright. *Rand McNally & Co. v. Fleet Management Systems, Inc.*, 591 F. Supp. 726, 735

(N.D. Ill. 1983). In *NADA Services, supra*, 1991 WL 287961, at *4, the court denied NADA's motion for a preliminary injunction based in part on "a strong public domain argument". As expected, the facts here and in *NADA Services* are analogous. Various states require by law the use of the NADA Guide, like the Red Book, in vehicle valuations. The court's public domain analysis emphasized the fact that the text of the NADA Guide changes monthly and thus, reference is the only practical way of incorporating the text of the Guide into the statute without constant revision. The Red Book is published approximately every six weeks. Because of the impracticality of statutory revision every six weeks, this matter is virtually indistinguishable from *Building Officials & Code Administrators International, Inc. v. Code Technology, Inc.*, 628 F.2d 730 (1 Cir. 1980), wherein state-promulgated administrative regulations incorporated the actual text of a privately developed building code which was held to be in the public domain. Moreover, the Red Book is virtually "indispensable to statutory compliance," *NADA Services, supra*, 1991 WL 287961, at *4.

A finding of public domain is further justified by the very real concern that public access to the Red Book could be impermissibly limited by Maclean Hunter's exercise of its right under copyright law to enforce a monopoly. While the Red Book is currently available by subscription, Maclean Hunter has the right, by virtue of its copyright, to chose not to license or distribute the Red Book at all. This element of copyright law cannot "be squared with the right of the public to know the law to which it is subject". *Building Officials, supra*, 628 F.2d at 735.

Plaintiff further asserts that Maclean Hunter is estopped from claiming infringement because it has committed copyright misuse by impermissibly extending its copyright monopoly. The defense of copyright misuse has generally been held not to exist. *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522, 1538 (S.D.N.Y. 1991) (citations omitted). While misuse may be found in cases where a copyright monopoly is broadened in an effort to restrain competition, generally an effort to set an industry standard in excess of fair use must be shown. *Id.* CCC's unsubstantiated statement that there is evidence "suggesting" that Maclean Hunter engaged in discriminatory licensing of the Red Book data is insufficient to make out a misuse defense.

Plaintiff's more "technical" defenses are unavailing as a matter of law. CCC claims that Maclean Hunter's infringement action is barred by the doctrines of waiver, estoppel and laches insofar as Maclean Hunter allegedly knew about CCC's business since 1983 and its VVS service since 1987 without objecting to CCC's conduct. CCC also asserts that it relied on Maclean Hunter's alleged acquiescence and is prejudiced by Maclean Hunter's failure to claim infringement until after plaintiff's suit was filed. The pre-trial record, however, is devoid of any material issues of fact as to these assertions. In 1987, Maclean Hunter made a written demand on CCC that it cease any copyright infringement and in 1989, Maclean Hunter issued a "To Whom It May Concern" letter stating that Stat:Tab and VISTA were the only authorized remarketers of the Red Book database and that any other use was in violation of the copyright laws. Def. App. A-653 to A-654, A-692 to

A-696. Additionally, Maclean Hunter's repeated printed warnings against reproduction of the Red Book belie any claim of waiver, estoppel or laches.

CCC further submits that the 1983 settlement agreement bars Maclean Hunter from asserting claims of copyright infringement. This argument is two-fold: first, CCC alleges that Maclean Hunter released CCC from all copyright claims and, second, CCC alleges that Maclean Hunter's claims are barred by res judicata. With respect to release, the parties in the 1983 action mutually released one another from all claims which arose from National's complaint. The copyrights which are the subject matter of the present litigation are for works in existence since 1988 and, therefore, are not within the scope of the 1983 agreement, to which Maclean Hunter was not a party.

For similar reasons, the doctrine of res judicata, which CCC accurately points out is designed to prevent repetitive litigation of the same claim, does not preclude defendants' copyright action. As a means of promoting judicial economy and certainty, "[r]es judicata will preclude relitigation of a claim where the earlier decision was a final judgment on the merits rendered by a court of competent jurisdiction, in a case involving the same parties or their privies, where the same cause of action is asserted in the later litigation". *Amalgamated Sugar Co. v. NL Industries, Inc.*, 825 F.2d 634, 639 (2 Cir.), *cert. denied*, 484 U.S. 992 (1987). CCC submits that the 1983 consent agreement between CCC and National resolved all copyright claims raised in National's 1983 complaint, and since the current Red Books contain the same "expression" as the Red Books at issue in 1983,

Maclean Hunter's present infringement claim is barred by res judicata. Maclean Hunter first points out that, by CCC's own representation, the 1983 litigation was resolved by consent agreement "without any findings or admissions of liability", CCC's Statement of Facts, ¶ 52, and, second, none of the copyright registrations upon which the present claims are based was in existence at the time of the 1983 litigation. Indeed, it does appear that no final decision on the merits was rendered in the 1983 action, and, at the very least, the two lawsuits do not assert the same cause of action because of the distinct copyright registrations at issue in each case.

Finally, CCC's assertion that defendants' claim of copyright infringement is barred by the statute of limitations is erroneous in view of defendants' request for relief for acts occurring solely within the three years preceding their counterclaim, cf. 17 U.S.C. § 507(b).

In conclusion, based on all of the foregoing, CCC's pending motion for summary judgment (Doc. No. 111) is granted as to CCC's claim of noninfringement and as to Maclean Hunter's counterclaim of infringement, and is denied as to CCC's claim of copyright invalidity. Maclean Hunter's pending motion for summary judgment (Doc. No. 136) is granted as to CCC's claim of invalid copyright registration and as to CCC's Affirmative Defenses Nos. (2), (5), (6), (7), (8), (9), (10), (11) and (12), and is otherwise denied as to CCC's claim of noninfringement and CCC's Affirmative Defenses Nos. (1), (3) and (4).

Dated at New Haven, Connecticut, this 7th day of April, 1993.

/s/ Arthur H. Latimer

ARTHUR H. LATIMER
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

CCC INFORMATION SERVICES, INC.,	)	
Plaintiff	)	
vs.	)	Civil No. 2:91CV00264 (AHN)
MACLEAN HUNTER MARKET REPORTS, INC. and CREATIVE AUTOMATION CO.,	)	
Defendants	)	

RULING ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON COPYRIGHT CLAIMS (DOC.NO.111) AND DEFENDANT'S (MACLEAN HUNTER MARKET REPORTS, INC.) MOTION FOR PARTIAL SUMMARY JUDGMENT ON COPYRIGHT ISSUES (DOC. NO. 136)

6/8/93. After review and over objection, the Magistrate Judge's Recommended Ruling is approved, adopted and ratified. SO ORDERED.

/s/ Alan H. Nevas
Alan H. Nevas, U.S.D.J.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

CCC INFORMATION SERVICES, INC.,	)	
Plaintiff	)	
vs.	)	Civil No. 2:91CV00264 (AHN)
MACLEAN HUNTER MARKET REPORTS, INC. and CREATIVE AUTOMATION CO.,	)	
Defendants	)	

JUDGMENT

This cause came on for consideration of the plaintiff's motion for an entry of final judgment pursuant to Rule 58, Fed. R. Civ. P., on Counts I through IV of its complaint and on the counterclaim of Maclean Hunter Market Reports, Inc., before the Honorable Alan H. Nevas, United States District Judge, and

The Court having considered the motion and all the papers submitted in connection therewith and having filed its Order of Final Judgment on February 9, 1994, directing the Clerk to enter judgment in accordance with the Order,

It is therefore **ORDERED** and **ADJUDGED** that judgment be and is hereby entered in favor of CCC on its claim for a declaratory judgment of noninfringement of copyrights held by Maclean Hunter in the "Automobile Red Book Official Used Car Valuations" ("Red Book"); in favor of CCC on Maclean Hunter's counterclaim for infringement of copyrights held by Maclean Hunter in the Red Book; in favor of Maclean Hunter on CCC's claim for a declaratory judgment of copyright invalidity of copyrights held by Maclean Hunter in the Red Book; in favor of Maclean Hunter on CCC's Affirmative Defenses Nos. 2, 5, 6, 7, 8, 9, 10, 11 and 12; and in favor of Maclean Hunter and Creative on CCC's claims for trade libel, tortious interference with contract, and violation of the Connecticut Unfair Trade Practices Act.

Dated at Bridgeport, Connecticut this 25th day of February, 1994.

KEVIN F. ROWE, Clerk

By_____
Chief Deputy Clerk

FEDERAL STATUTES

17 U.S.C. § 101:

* * * *

A "collective work" is a work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole.

A "compilation" is a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship. The term "compilation" includes collective works.

17 U.S.C. § 103:

(a) The subject matter of copyright as specified by section 102 includes compilations and derivative works, but protection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully.

(b) The copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material. The copyright in such

work is independent of and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material.

STATE STATUTES AND REGULATIONS

Conn. Gen. Stat. § 38a-353 (1990):

Whenever any damaged motor vehicle covered under an automobile insurance policy has been declared to be a constructive total loss by the insurer, the insurer shall, in calculating the value of such vehicle for purposes of determining the settlement amount to be paid to the claimant, use at least the average of the retail values given such vehicle by (1) the National Automobile Dealers Association used car guide and (2) one other automobile industry source which has been approved for such use by the insurance commissioner. For purposes of this section, "constructive total loss" means the cost to repair or salvage the damaged property, or the cost to both repair and salvage such property, equals or exceeds the total value of the property at the time of loss.

Conn. Ins. Dept. Bull. No. IC-4 (August 28, 1987):

Public Act 87-158, An Act Concerning the Value of Totalled Motor Vehicles, requires that when calculating the value of a totalled vehicle insurers shall "use at least the average of the retail values given such vehicle by (1) the National Automobile Dealers Association used car guide and (2) one other automobile industry source which has been approved for such use by the insurance commissioner."

* * * *

The document used by most automobile dealers and repairers in this state is the NADA and "Red Book." Experience in responding to consumer complaints and/or inquiries has led to a conclusion that these two source materials provide the overall best method for vehicle valuation. By identifying two sources of information, rather than a number of different, and potentially conflicting opinions, a common starting point of reference is achieved and potential areas of dispute limited. Accordingly, the "Red Book" is hereby designated and approved by the undersigned for calculation of the value of motor vehicles by insurers in the State of Connecticut.

PETER W. GILLIES
Insurance Commissioner

N.J. Admin. Code § 11:3-10.4 (1988):

Adjustment of total losses

(a) If the insurer elects to make a cash settlement, it must bear in mind at all times that the insured's position is that of a retail consumer and the settlement value arrived at must be reasonable and fair for a person in that position. If the insurer elects to make a cash settlement, its offer, subject to applicable deductions, must be one of the following plus applicable sales tax:

1. The average of the retail value for a substantially similar motor vehicle as listed in the current editions of

the two valuation manuals approved by the Commissioner.

i. The average figure arrived at may be reduced by considering all factors, including but not limited to mileage tables and presence or absence of extras.

ii. If the destroyed vehicle included an option which is listed in one manual but not in the other, the value of the option shall not be averaged. The insured shall receive full value for the option by carrying over the amount listed to the other manual. The option carryover shall apply only in those instances where the option has not been considered by the used vehicle guide either as a separate item or included in the vehicle's base value.

iii. Manuals approved for use on and after January 1, 1976, are the "Redbook", published by National Market Reports, Inc., and the "N.A.D.A. Official Used Car Guide", published by the National Automobile Dealers Association Used Car Guide Company. The use of any other manuals may be approved by the Commissioner upon demonstration of need, suitability and accuracy.

2. A quotation obtained by the insurer for a substantially similar motor vehicle, obtained from a dealer or individual located within a reasonable distance from the principal place of garagement of the insured vehicle. The insured must be able to purchase the substantially similar vehicle at the quoted location for the insurer's cash offer plus applicable deductions.

3. If it is not possible to value the damaged vehicle by using alternative methods, paragraphs 1 or 2 of this subsection, the insurer must determine the retail value by the best available method and must fully explain in writing to the insured how its offer was calculated.

* * * *

11 N.Y. Admin. Code § 216.7(c) (1990):

(c) Adjustment of total losses

(1) If the insurer elects to make a cash settlement, its minimum offer, subject to applicable deductions, must be one of the following:

(i) The average of the retail values for a substantially similar vehicle as listed in two valuation manuals current at the date of loss and approved by this Department. Manuals approved for use are -- *The Redbook*, published by National Market Reports, Inc., and *The N.A.D.A. Official Used Car Guide*, published by the National Automobile Dealers Used Car Guide Company. The use of other manuals may be approved by this Department upon demonstration of need and suitability. If it is evident that an option has not been considered in either or both of the above valuation manuals, the insurer shall consider the value, if any, of such option in arriving at the vehicle's value and shall utilize the best available method to value such option. The insurer may deduct documented, reasonable dealer preparation charges, up to

$75, from the average of the retail values. The insurer shall provide to the insured, no later than the date of payment of the claim, a detailed copy of its calculation of the insured vehicle's total loss value, including the valuation of options which are not considered in the base price of the vehicle.

(ii) A quotation for a substantially similar vehicle, obtained by the insurer from a qualified dealer located reasonably convenient to the insured. A reasonable location shall be within 25 miles of the place of principal garagement of the motor vehicle. The substantially similar available vehicle must remain available for purchase by the insured for a period of three calendar days subsequent to receipt of notice of its availability by the insured, and the insured must be able to purchase the substantially similar vehicle at the quoted dealer for the insurer's cash offer plus applicable deductions. The insurer must maintain in its claim file the dealer's name and location, the vehicle identification number, the dealer stock number, the mileage and the major options for the substantially similar vehicle which was the basis of its quote. The notice to the insured of the availability of a substantially similar vehicle must be sent by certified mail, return receipt requested, or be a sound-recorded conversation reflecting the date of notice. The three calendar days commence on the date the insured acknowledges receipt of notice. The insured need not purchase the vehicle used as the basis of the insurer's quotation, since the quotation merely serves as a basis for the insurer's offer. The foregoing period is satisfied at the point an insured physically verifies the existence of

the substantially similar available vehicle used as the basis of the insurer's quotation. Should the insurer's research of substantially similar vehicles determine that the retail values contained in the valuation manuals, prescribed in subparagraph (i) of this paragraph, are inadequate to purchase a substantially similar vehicle, the insurer's offer should be the amount determined by such research.

31 Pa. Code § 62.3 (1989):

(f) The following standards shall be used to determine replacement value under policy provisions covering the total loss of a motor vehicle including an unrecovered motor vehicle:

(1) If the costs of repair of a motor vehicle exceed its appraised value, less salvage value, or the motor vehicle cannot be satisfactorily or reasonably repaired to its condition just prior to the damage in question being incurred, the appraised value of the loss shall be the replacement value of the motor vehicle.

(2) The replacement value of a motor vehicle shall be calculated by use of one of the following methods:

(i) *Guide book method.* The appraiser shall calculate the average of the figures reflecting the retail book value of a vehicle of like kind and condition, as stated in the correct of the Red Book (National Market Reports, Inc., Circulation

Department, 300 West Adams Street, Chicago, Illinois 60606, telephone 1-800-671-9907) and the NADA Book (Subscription Department, P.O. Box 7800, Costa Mesa, California 92628, telephone 1-800-622-6232), adjusted for equipment and mileage, less the cost of repair of damage which preexisted the accident in question. There shall be no other deductions except for salvage and then only if the owner elects to retain the vehicle.

(ii) *Actual cost method.* The appraiser shall determine the actual cost of purchase of an available motor vehicle of like kind and quality in condition similar to or better than the motor vehicle being appraised just prior to the damage in question being incurred.

(iii) *Dealer quotation method.* The appraiser shall consult with delaers or other persons knowledgeable in the field to secure quotations as to the value of the motor vehicle being appraised. At least two quotations shall be secured. The figures thus secured shall be averaged.

(3) If the motor vehicle is listed in both the Red Book and the NADA Book, including older car publications, the replacement value shall be calculated by the guide book method or by the actual cost method, as described in paragraph (2). If the actual cost method is used, and the owner of the damaged vehicle shows that the replacement vehicle is not of the same kind and quality, both calculations referenced in this paragraph

shall be made, and the higher of the values obtained shall be offered in settlement.

(4) If the motor vehicle is not listed in both the Red Book and the NADA Book, including older car publications, or if the vehicle differs materially from the average vehicle because of factors not considered in guide books, for example, antique or classic cars, vehicles no longer manufactured, and unique vehicles, the replacement value shall be calculated by the actual cost method or by the dealer quotation method, as described in paragraph (2). If the dealer quotation method is used, both calculations referenced shall be made, and the higher of the values offered in settlement.

CCC REPORT
July 1991

CONFIDENTIAL

AETNA CASUALTY & SURETY (203)240-6540
BOX 930
HARTFORD, CT 06143

DATE: 08/01/91 VINGUARD VALUATION SERVICE - 27545 - 11619038 TIME: 17:01

ADJUSTER:	CLAIM REFERENCE:	LOSS DATE:	VIN:
ROTHERFORTH	2078Y26938781	06/11/91	1GTFK24K7KE508211
OWNER:		INSURED:	

VINGUARD: 89 GMC K25 4X4 TK24
8-5.7L-FI
INSURER: 89 GMC K25 4X4 WIDESIDE TK24
8-5.7L-FI AT 4W 2D P/U
MESSAGES: * NO ERRORS DETECTED *

OPTIONS: (B = BASE A = ADD D = DEDUCT N = NO ADJUSTMENT)

AUTO TRANSMISSION	A *	142.50	4 WHEEL DRIVE	B	0.00
POWER STEERING	B	0.00	POWER BRAKES	B	0.00
POWER WINDOWS	A	137.50	POWER LOCKS	A	112.50
AIR CONDITIONING	A *	250.00	TILT WHEEL	A	100.00
CRUISE CONTROL	A	125.00	AM RADIO	B	0.00
FM RADIO	A *	37.50	STEREO	A *	37.50
CASSETTE	A	100.00	SEARCH/SEEK	A *	75.00
EQUALIZER	A *	200.00	TWO TONE PAINT	B	0.00
BEDLINERS(DURALINER)	A *	125.00	TRAILERING PACKAGE	A *	150.00
SNOWPLOW PACKAGE	A	800.00			

COMPUTERIZED BASE VALUE		$ 11,387.50
TOTAL OPTIONS		$ 2,412.50
SIERRA SLE	A	$ 650.00
ODOMETER - 39,000	D	$ 325.00-
DEALER PREP	D	$ 25.00-
ACTUAL CASH VALUE		$ 14,100.00
SALES TAX 8.00%	A	$ 1,128.00
COMPUTERIZED VALUE		$ 15,228.00

*OCS=JOHN/S UNIT.

NOTICE: THIS TOTAL LOSS EVALUATION HAS BEEN PREPARED BY COMPUTER IN ACCORDANCE WITH CONNECTICUT PUBLIC ACT 87-158.

TER

AUTOMOBILE RED BOOK
July 1991

GMC 1989

Avg. Fin. Value	Avg. Whsl. Value	Model No.	Description	Engine	GVW	W.B.	Net Wt.	Sugg. Fact. Price	Ins Symb.	Avg. Retail Value	O P T
Pickup Extended Cab 4x2 C Series Wideside Conv. (Fenderless) T = 1,M = 3 (continued)											
8875	7750	C19	Pkup Ext 4x2 1500	8G 262	6000	155.5	4074	11527		8600	X
7250	6100	C29	Pkup Ext 4x2 2500	8G 262	7200	141.5	NA	NA		9200	X
7425	6250	C29	Pkup Ext 4x2 2500	8G 262	7200	155.5	4224	12568		9300	X
7925	6450	C29	Pk Ext 4x2 2500 HD	8G 350	8800	155.5	NA	13472		9500	X
7875	6750	C39	Pkup Ext 4x2 3500	8G 454	8800	155.5	4562	13813		9600	X
Pickup 4x4 K Series Wideside Conventional (Fenderless) T = 1,M = 3											
7670	6525	K14	Pkup 4x4 1500	8G 262	5600	117.5	4097	12425		9725	X
7925	6675	K14	Pkup 4x4 1500	8G 262	5600	131.5	4178	12620		9675	X
8188	6875	K24	Pkup 4x4 2500	8G 262	7200	131.5	4295	12814		10275	X
8438	6375	K24	Pkup 4x4 2500 HD	8G 350	8800	131.5	NA	14534		10575	X
8705	6675	K34	Pkup 4x4 3500	8G 454	8800	131.5	4883	14874		10675	X
Pickup Extended Cab 4x4 K Series Fleetside Conv. T = 1,M = 3											
8325	8200	K19	Pkup Ext 4x4 1500	8G 262	6200	141.5	NA	NA		10400	X
8488	8400	K19	Pkup Ext 4x4 1500	8G 262	6200	155.5	4521	13751		10900	X
8638	8600	K29	Pkup Ext 4x4 2500	8G 262	7200	141.5	NA	NA		11000	X
8905	8800	K29	Pkup Ext 4x4 2500	8G 262	7200	155.5	4580	14131		11150	X
9135	10150	K29	Pk Ext 4x4 2500 HD	8G 350	8800	155.5	NA	15582		11300	X
9405	10400	K39	Pkup Ext 4x4 3500	8G 454	8800	155.5	4900	15821		11600	X
Pickup Bonus Cab 4x2 R Series Wideside Conv. (Fenderless) T = 1,M = 3											
—	—	R24	Bns Pkup 4x2 25	8G 350	8600	164.5	4748	14228		—	X
—	—	R34	Bns Pkup 4x2 35	8G 350	9300	164.5	4821	14362		—	X
Pickup Crew Cab 4x2 R Series Wideside Conv. (Fenderless) T = 1,M = 3											
—	—	R24	Crew Pkup 4x2 25	8G 350	8200	164.5	4808	14726		—	X
—	—	R33	Crew Pkup 4x2 35	8G 350	9300	164.5	4882	14871		—	X
Pickup 4x2 C Series Sportside Conv. (Fender) T = 1,M = 3											
8455	7175	C14	Pkup 4x2 1500	8G 262	5300	117.5	3429	10553		8275	X
Pickup 4x4 K Series Sportside Conv. (Fender) T = 1,M = 3											
7995	6775	K14	Pkup 4x4 1500	8G 262	5600	117.5	4023	12578		9875	X
Pickup Bonus Cab 4x4 V Series Wideside Conv. (Fenderless) T = 1,M = 3											
—	—	V34	Bns Pkup 4x4 35	8G 350	9200	164.5	5306	18949		—	X
Pickup Crew Cab 4x4 V Series Wideside Conv. (Fenderless) T = 1,M = 3											
—	—	V33	Crew Pkup 4x4 35	8G 350	9200	164.5	5367	17481		—	X

MISCELLANEOUS EQUIPMENT

Avg. Fin. Value	Avg. Whsl. Value	Item	Application	Sugg. Fact. Price	Avg. Retail Value
175	175	Sierra SLX (C,K Pkup)		Avg 350	300
225	225	High Sierra (R,V Pkup)		Avg 372	325
800	800	Sierra SLE (C,K Pkup)		Avg 643	650
850	850	Sierra Classic (R,V Pkup)		Avg 888	800
775	775	Sierra Classic Suburban		Avg 1656	1050
750	750	Sierra Classic Jimmy V18		1340	1000
150	150	High Sierra (S15 All)		Avg 219	200
425	425	Sierra Classic (S15 All)		Avg 610	550
700	700	Gypsy (S15 Jimmy)		Avg 1063	950
350	350	Leather High Backs (S15)		Avg 511	400
300	300	High Back Buckets (Suburban)		887	400
250	250	V8 over 4 Cyl.		—	325
350	350	V8 over 6 Cyl.		—	325
975	975	Diesel over Gas		—	900

ENGINES

Avg. Fin. Value	Avg. Whsl. Value	Model	Application	Cyl.	Cu.In.	H.P.	Tax H.P.	Sugg. Fact. Price	Avg. Retail Value
NOTE: Prices for 379 6.5L diesel engines are approximate.									
—	—	151		4	151	92	NA	STD	—
—	—	173		6	173	110	NA	STD	—

GMC 1989

ENGINES

Avg. Pic. Value	Avg. Whsl. Value	Model	Application	Cyl.	Cu.In.	H.P.	Tor. H.P.	Suggs. Fact. Price	Avg. Retail Value
—	—	262		8	262	140	NA	STD	—
—	—	292		6	292	115	265	STD	—
—	—	305		8	305	150	245	STD	—
—	—	350		8	350	165	512	STD	—
—	—	350		8	350	165	512	STD	—
—	—	454		8	454	245	378	STD	—
—	—	173	LS 151-E	4	173	110	NA	370	—
—	—	262	LS 161-E	6	262	140	NA	550	—
—	—	—	LS 173-E	6	262	140	NA	255	—
—	—	305	LS 262-E	8	305	150	245	556	—
—	—	350	LS 262-E	8	350	165	512	755	—
—	—	—	LS 292-1	8	350	165	512	755	—
—	—	454	LS 292-1	8	454	245	378	1325	—
—	—	454	LS 350-E	8	454	245	378	459	—
—	—	379	H.D LS GAS	8	379	130	NA	2500	—

1988 GMC

Avg. Pic. Value	Avg. Whsl. Value	Model No.	Description	Engine	GVW	W.B.	Net Wt.	Suggs. Fact. Price	Inv.	Avg. Retail Value	O T
Note: Model Numbers shown are the 5th, 6th & 7th Digits of the VIN No. GMC light duty truck types are designated by a letter as follows: R=4x2, C=4x2, V=4x4, K=4x4, S=Compact 4x2, T=Compact 4x4, G=Van; M=Mini Van, P=Shapes											
Dual Rear Wheels Standard.											
ChsCab S15 4x2 Compact Conventional T=1,M=3											
—	—	S14	Chs Cab S15	4G 151	4100	117.9	NA	8865		—	X
Pickup S15 4x2 Wideside Compact (Fenderless) T=1,M=3											
3530	3025	S14	Pkup S15 4x2 Spl	4G 2.5	3500	108.3	2609	8640		4799	X
4250	4725	S14	Pkup S15 4x2	4G 2.5	3500	108.3	2530	7980		8888	X
4365	4875	S14	Pkup S15 4x2	4G 2.5	3500	117.9	2800	8184		5775	X
Pickup Extended Cab S15 4x2 Wideside Compact (Fenderless) T=1,M=3											
4815	5300	S15	Pkup S15 Ext 4x2	4G 2.5	3500	122.9	2615	9009		6250	X
Pickup T15 4x4 Wideside Compact (Fenderless) T=1,M=3											
5725	6375	T14	Pkup S15 4x4	4G 2.5	3825	108.3	2968	10184		7355	X
5850	6500	T14	Pkup S15 4x4	4G 2.5	3825	117.9	2933	10268		7488	X
Pickup Extended Cab T15 4x4 Wideside Compact (Fenderless) T=1,M=3											
6275	6975	T15	Pkup S15 Ext 4x4	4G 2.5	3825	122.9	2958	10875		7688	X
Jimmy S15 4x2 Closed Compact Utility Hardtop T=1,M=3											
5535	6150	S15	S15 4x2	4G 2.5	3597	100.5	2801	10875		7228	X
Jimmy T15 4x4 Closed Compact Utility Hardtop T=1,M=3											
6975	7750	T15	S15, 4x4	4G 2.5	4075	100.5	3115	12794		8888	X
Jimmy K5 Closed Utility w/Hard Top T=1,M=3											
8995	9999	V15	K5 4x4	8G 350	6100	165.5	4334	14999		10999	X
Suburban 4x2 Wagon w/Panel Doors T=3,M=3											
7875	8750	R15	Wgn P Dr 4x2 15	8G 350	6100	129.5	4297	13997		9999	X
8100	9000	R25	Wgn P Dr 4x2 25	8G 350	8600	129.5	4588	14611		10199	X
Suburban 4x2 Wagon w/End Gate T=3,M=3											
7920	8800	R15	Wgn Gate 4x2 15	8G 350	6100	129.5	4335	14040		9999	X
8145	9050	R25	Wgn Gate 4x2 25	8G 350	8600	129.5	4706	14664		10299	X
Suburban 4x4 Wagon w/Panel Doors T=3,M=3											
9135	10150	V15	Wgn P Dr 4x4 15	8G 350	6100	129.5	4714	14992		11499	X
9360	10400	V25	Wgn P Dr 4x4 25	8G 350	8600	129.5	4986	16000		11799	X
Suburban 4x4 Wagon w/End Gate T=3,M=3											
9180	10200	V15	Wgn Gate 4x4 15	8G 350	6100	129.5	4752	14984		11399	X
9405	10450	V25	Wgn Gate 4x4 25	8G 350	8600	129.5	5024	16345		11799	X
Safari 4x2 Mini Cargo Van T=2,M=3											
5445	6050	M15	Safari Cargo	4G 151	NA	111	3388	9839		7199	X
Safari 4x2 Mini Passenger Van T=2,M=3											
6345	7050	M15	Safari SLX	4G 151	NA	111	3588	10745		8399	X
6725	7475	M15	Safari SLE	4G 151	NA	111	3637	11538		8775	X

(2)

No. 94-2004

FILED
JUL 7 1995
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 1994

CCC INFORMATION SERVICES, INC.,
Petitioner,

v.

MACLEAN HUNTER MARKET REPORTS, INC.,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

BRIEF IN OPPOSITION OF RESPONDENT MACLEAN HUNTER MARKET REPORTS, INC.

Stephen M. Feldman
Carolyn P. Carmody
Wendy S. Lader
SPIEGEL & McDIARMID
1350 New York Ave., N.W.
Washington, D.C. 20005
(202) 879-4000

Thomas P. Sarro
William J. Jackson*
LARSON AND TAYLOR
727 - 23rd Street South
Arlington, Virginia 22202
(703) 920-7200

**Counsel of Record*

Counsel for Respondent

Balmar Legal Publishing Services, Washington, D.C. (202) 682-9800

BEST AVAILABLE COPY

3502

QUESTIONS PRESENTED

1. Whether, under the Copyright Act, the court of appeals properly held that expressing the value of a used vehicle does not merge with the idea of valuing used vehicles.
2. Whether the court of appeals properly held that a publication does not fall into the public domain and lose its copyright protection when the publication is merely referenced in a state regulation or statute.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
STATUTORY PROVISIONS	2
STATEMENT	2
A. Factual Background	2
B. Procedural Background	5
REASONS FOR DENYING THE WRIT	7
I. The Court's Copyright Protection of Red Book Valuations Does Not Expand Copyright Law Principles Or Violate First Amendment Interests.	7
A. CCC Has No First Amendment Right To Copy Original Expression.	8
B. The Court's Decision To Withhold The Merger Doctrine Is Consistent With Copyright Law and First Amendment Principles.	9
C. The Court's Decision Does Not Confer A Statutory Monopoly Over Ideas.	13
II. The Time At Which A Court Applies The Merger Analysis Has No Impact On This Case.	15
III. Reference To The Red Book In Public Statutes Does Not Remove Copyright Protection.	16
CONCLUSION	21

APPENDIX

Federal Statutes 1a

Conn. Ins. Dept. Bull. No. IC-10 (Dec. 10, 1992) . . 4a

Excerpts from April 1 - May 14, 1991
Automobile Red Book; Official Used Car Valuations:

Mileage Chart 6a

Light Duty Trucks, Domestic and Import
Option Valuation Chart 7a

TABLE OF AUTHORITIES

Cases	Page(s)
Baker v. Selden, 101 U.S. 99 (1879)	10
Building Officials & Code Adm. v. Code Technology, Inc., 628 F.2d 730 (1st Cir. 1980)	17
Building Officials & Code Adms. Int'l Inc. v. Code Technology Inc., 210 U.S.P.Q. 289 (D. Mass. 1980)	17
Computer Associates Int'l, Inc. v. Altai, Inc., 982 F.2d 693 (2d Cir. 1992)	8
Del Madera Properties v. Rhodes and Gardner, Inc., 637 F. Supp. 262 (N.D. Cal. 1985), *aff'd*, 820 F.2d 973 (9th Cir. 1987)	18
Educational Testing Services v. Katzman, 793 F.2d 533 (3d Cir. 1986)	11
Feist Publications, Inc. v. Rural Tel. Serv. Co., Inc, 499 U.S. 340 (1991)	6
Gates Rubber Co. v. Bando Chemical Indus., Ltd., 9 F.3d 823 (10th Cir. 1993)	12,14
Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539 (1985) . . .	9,19
Herbert Rosenthal Jewelry Corp. v. Kalpakian, 446 F.2d 738 (9th Cir. 1971) . . .	10
Hoehling v. Universal City Studios, Inc., 618 F.2d 972 (2d Cir.), *cert. denied*, 449 U.S. 841 (1980)	12,14
Kregos v. Associated Press, 937 F.2d 700 (2d Cir. 1991)	10,11,15

Cases	Page(s)
Marshall & Swift v. BS & A Software, 871 F. Supp. 952 (W.D. Mich. 1994)	12
Mason v. Montgomery Data, Inc., 967 F.2d 135 (5th Cir. 1992)	15
NADA Servs. Corp. v. CCC Information Servs., Inc., No. 91 C 4593, 1991 WL 287961 (N.D. Ill., Nov. 15, 1991)	18
Nichols v. Universal Pictures Corp., 45 F.2d 119 (2d Cir. 1930), *cert. denied*, 282 U.S. 902 (1931)	10,11
Practice Management Information Corp. v. American Medical Ass'n, 877 F. Supp. 1386 (C.D. Cal. 1994)	18,19
Rand McNally & Co. v. Fleet Management Sys. Inc, 591 F. Supp. 726 (N.D. Ill. 1983) . .	18
Rocky Mountain Motor Tariff Bureau v. G.R. Leonard & Co., 652 F. Supp. 1473 (D. Colo. 1987)	18
Roth v. Pritikin, 710 F.2d 934 (2d Cir.), *cert. denied*, 464 U.S. 961 (1983)	19
Wainwright Sec. v. Wall Street Transcript Corp., 558 F.2d 91 (2d Cir. 1977), *cert. denied* 434 U.S. 1014 (1978)	12

Constitutional and Statutory Provisions	**Page(s)**
U.S. Const. amend. I	*passim*
17 U.S.C. § 101	2,8,14
17 U.S.C. § 102	2,8
17 U.S.C. § 106	2,14
17 U.S.C. § 501	2,5
28 U.S.C. § 1338	5
28 U.S.C. § 1367	5
Conn. Ins. Dept. Bull. No. IC-4 (Dec. 19, 1992)	2,5
N.J. Admin. Code § 11:3-10.4 (1988)	5
N.Y. Comp. Codes R. & Regs. tit. 11, § 216.7(c)	5
31 Pa. Code § 62.3(f)(2) (1984)	5
Treatises and Articles	
Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* (1994)	*passim*

No. 94-2004

IN THE

Supreme Court of the United States

October Term, 1994

CCC INFORMATION SERVICES, INC.,

Petitioner,

v.

MACLEAN HUNTER MARKET REPORTS, INC.,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

BRIEF IN OPPOSITION OF RESPONDENT MACLEAN HUNTER MARKET REPORTS, INC.

Respondent, Maclean Hunter Market Reports, Inc. ("Maclean Hunter"),[1] respectfully requests that the Court deny the petition for writ of certiorari seeking review of the Second Circuit's decision in this case. That opinion is reported as 44 F.3d 61 (2d Cir. 1994). Pet. App. 1a-32a.[2]

---

[1] Respondent, Maclean Hunter Market Reports, Inc., is wholly owned by K-III Communications, a New York City publishing company. Maclean Hunter currently does business under the name of National Market Reports, Inc.

[2] "Pet. App. __" refers to pages in the Appendix submitted by the Petitioner to the Court. "Resp. App. __" refers to pages in the Appendix attached to this Brief in Opposition.

STATUTORY PROVISIONS

Pertinent portions of the United States Copyright Act, 17 U.S.C. §§ 101 - 1101, are reproduced verbatim in the Appendix.

17 U.S.C. § 101. Definitions of "derivative work" and "Literary Works" (Resp. App. 1a)

17 U.S.C. § 102. Subject matter of copyright: In general (Resp. App. 1a-2a)

17 U.S.C. § 106. Exclusive rights in copyrighted works (Resp. App. 2a)

17 U.S.C. § 501. Infringement of copyright (Resp. App. 3a)

The Connecticut Insurance Department Bulletin No. IC-10 (Dec. 10, 1992) is also produced verbatim in the Appendix. (Resp. App. 4a-5a).

STATEMENT

A. *Factual Background.*[3] Maclean Hunter and its predecessors have published the *Automobile Red Book — Official Used Car Valuations* ("Red Book") since 1911. J.A. 30; J.A. 627.[4] The Red Book guidebook is published eight times a year for three different regions (A, B and C) and the state of Wisconsin. J.A. 92; J.A. 406-408. Each edition of the Red Book has included a copyright notice and was registered with the U.S. Copyright Office previous to the time CCC first offered its used car valuation services in 1985. J.A. 511; J.A. 627.

---

[3] The Statement of the Case in the petition filed by CCC Information Services, Inc. ("CCC") contains a number of factual misstatements regarding, *inter alia*, whether CCC copied original expressions of Maclean Hunter, the extent of CCC's copying, and the specific requirements of the state regulations and statutes cited by CCC. In accordance with Sup. Ct. R. 15.1, the following recitation corrects and supplements these statements.

[4] "J.A. __" refers to the Joint Appendix pages submitted by the parties to the Second Circuit.

Each Red Book contains the editors' valuations for domestic and imported "average"[5] used cars and light trucks that are seven years old or less. J.A. 90; J.A. 93; J.A. 210-211; J.A. 628.[6] Since 1983, each edition of the Red Book has stated that the valuations are "projected estimates of used vehicle values," that the Red Book does "not report actual market prices," that "as a guidebook, we project to the best of our ability vehicle values for the future period(s) covered by each [edition]" and that "[y]ou, the subscriber, must be the final judge of the actual value of a particular vehicle." J.A. 93; J.A. 627-628.

The valuations published in the Red Book are the editors' opinion and judgment of the future values of average used vehicles for a period of six weeks following the edition's publication date. The valuations and selections in the Red Book and the Older Red Book are the original creations of the Red Book editors based on the editors' many years of experience and accumulated knowledge in the field. *See, e.g.*, J.A. 73; J.A. 208-215; J.A. 227-228; J.A. 629-630 ¶ 8; J.A. 633.

Red Book editors also publish their opinions and judgments regarding car options, mileage variances,[7] and geographical differences. The reader can use these figures to make closer approximations of a particular vehicle's value.

---

[5] "Average" refers to a "hypothetical 'average' car in 'average' condition." J.A. 75.

[6] Maclean Hunter also publishes *Older Car/Truck Red Book — Official Used Car Valuations* ("Older Red Book"). The Older Red Book, which is published quarterly, projects opinions of value for "average" domestic and imported cars and light trucks that are from eight to eighteen years old. J.A. 117; J.A. 632.

[7] The Red Book contains a mileage chart (Resp. App. 6a) and an option valuation chart for cars and light trucks. Resp. App. 7a. The mileage chart reflects the judgment of the Red Book editors as to the increased value a car may have with low mileage and the decreased value a car may have with high mileage. The option valuation charts estimate the value added to vehicles featuring itemized options such as power windows or cruise control.

Petitioner CCC has engaged in systematic copying of the retail and wholesale valuations published in the Red Book and the selection and arrangement of these valuations and has loaded this material directly into a computer database for use with various services provided by CCC. J.A. 435-438; J.A. 511-513; J.A. 526- 527; J.A. 550.[8] Simply put, CCC "literally tear[s] the [Red B]ook apart by the different [automobile] makes" and enters the information into its database. J.A. 513.[9]

The District Court found that CCC's wholesale copying of "the Red Book's valuation data is undisputed" (Pet. App. 47a), that "CCC subscribes to ... and openly admits its use of Red Book valuations" (Pet. App. 47a) and that "CCC inputs Red Book's retail, wholesale, option and mileage valuations into its computer database of VVS reports...." Pet. App. 58a. The Second Circuit confirmed this conclusion, stating that "[s]ince at least 1988, CCC has itself been systematically loading major portions of the Red Book onto its computer network and republishing Red Book information in various forms to its customers." Pet. App. 4a-5a. CCC copies not only the used car valuations projected by Red Book editors, but also copies the selection and arrangement of the material presented in the Red Book. Pet. App. 4a-5a, 27a-28a.

While the Red Book is approved for use in Connecticut, New Jersey, New York, and Pennsylvania, none of these states requires that the Red Book be used for assessing a car's value

---

[8] In 1981, CCC sought a license from Maclean Hunter's predecessor to use Red Book valuations. J.A. 18. In 1982 and thereafter, CCC unsuccessfully sought a license for authorized use of Red Book's valuations. J.A. 19-48. In 1984, CCC wrote to Maclean Hunter to inform Maclean Hunter that it was being "ripped off" because another computer averaging service was using Red Book's figures. J.A. 68-70.

[9] CCC also copies the high and low retail valuations and option valuations and selections from the Older Red Book for use in connection with its services. J.A. 161-162.

for insurance purposes.[10] These statutes and regulations are directed to insurers and offer them several alternatives for arriving at fair valuations of used vehicles. N.J. Admin. Code § 11:3-10.4 (1988) (permits settlements based upon quotations obtained from local dealers for substantially similar motor vehicles regardless of Red Book values) (Pet. App. 71a-72a); N.Y. Comp. Codes R. & Regs. tit. 11, § 216.7(c) (same) (Pet. App. 73a-75a); and 31 Pa. Code § 62.3(f)(2) (1984) (same) (Pet. App. 75a-77a). Connecticut approves the use of different valuation services, including CCC, and, thus, cannot be characterized as requiring the use of the Red Book. Conn. Ins. Dept. Bull. No. IC-10 (Dec. 10, 1992). Resp. App. 4a-5a. *Compare* Pet. 5.

B. *Procedural Background.* On March 19, 1991, CCC filed a complaint for, *inter alia*, a declaratory judgment pursuant to 28 U.S.C. §§ 1338(a)(b), 1367(a) that no copyrightable material had been taken from Maclean Hunter. Maclean Hunter answered and counterclaimed, under 17 U.S.C. § 501, asserting the validity of its copyrights and infringement thereof.

Following the submission of motions for summary judgment by both parties, Magistrate Judge Arthur Latimer issued a recommended ruling which was adopted by the District Court for the District of Connecticut on June 8, 1993. Pet. App. 65a. In addition to the elements of the recommended ruling that CCC found favorable and described in its petition (Pet. 8-9), the magistrate judge ruled against CCC on its affirmative defenses of fair use, invalid registration, unenforceable copyright, waiver, estoppel, laches, release, statute of limitations and *res judicata*. Pet. App. 45a-63a.

---

[10] CCC crafts its second question for review as though the Red Book is "required to be used by" state laws (Pet. i) and, similarly, mischaracterizes the laws of these four states in its Factual Background (Pet. 5) and its Argument. Pet. 27.

On appeal by Maclean Hunter, the Second Circuit found that the district court had erred in ruling that the Red Book valuations command no copyright protection by reason of lack of originality. Pet. App. 15a. First, the Second Circuit determined that "[t]he valuations themselves are original creations of Maclean" (Pet. App. 13a), reasoning that the district court was "simply mistaken in its conclusion that the Red Book valuations were, like the telephone numbers in *Feist*,[11] pre-existing facts that had merely been discovered by the Red Book editors." Pet. App. 12a. Instead, the court found that the Red Book valuations were based on the professional judgment and expertise of the editors. Pet. App. 4a, 13a.

In addition, the Second Circuit found that "the *selection and arrangement* of data in the Red Book displayed *amply* sufficient originality to pass the low threshold requirement to earn copyright protection." Pet. App. 14a (emphasis added). The Second Circuit identified, *inter alia*, the following aspects of the Red Book as constituting original expression:

> (1) the selection and manner of presentation of optional features for inclusion; (2) the adjustment for mileage by 5,000 mile increments (as opposed to using some other breakpoint and interval); (3) the use of the abstract concept of the "average" vehicle in each category as the subject of the valuation; and (4) the selection of the number of years' models to be included in the compilation.

Pet. App. 14-15a (footnote omitted).

The Second Circuit further determined that the district court erred in applying the "merger doctrine" to bar copyright protection of the Red Book. According to the Second Circuit, the district court incorrectly found that "each entry in the Red

---

[11] *Feist Publications, Inc. v. Rural Tel. Serv. Co., Inc*, 499 U.S. 340 (1991).

Book is an idea — the idea of the value of the particular vehicle — and that idea is necessarily communicated by a dollar figure." Pet. App. 6a. Instead, the court of appeals ruled that the idea of valuing used vehicles and the Red Book editors' expressions of the value of "average" used vehicles were separable (Pet. App. 20a-30a), that Maclean Hunter sought no monopoly over the idea of valuing used vehicles (Pet. App. 28a) and that "[o]thers, including CCC, remain free to value used cars and to profit from their valuations." Pet. App. 30a, n.28.

Finally, the Second Circuit rejected as unsupported the district court's finding that the Red Book had fallen into the public domain. Pet. App. 30a-31a. The Second Circuit concluded that a state's reference to a copyrighted work as a standard for valuing vehicles should not result in the loss of the copyright. Pet. App. 31a.

REASONS FOR DENYING THE WRIT

The court of appeals properly decided to withhold application of the "merger doctrine" and the "public domain" doctrine. Further review is unwarranted because the rulings of the court below neither extend existing copyright law nor conflict with decisions of this Court or any other courts of appeals.

I. The Court's Copyright Protection of Red Book Valuations Does Not Expand Copyright Law Principles Or Violate First Amendment Interests.

The decision below does not impermissibly impinge upon the free speech of CCC or the public. CCC's petition should be denied because the Second Circuit properly applied both the purpose of the Copyright Act and cases interpreting that Act and fully supported its decision with the facts of the case.

A. CCC Has No First Amendment Right To Copy Original Expression.

CCC argues that the Second Circuit's decision impermissibly withholds certain ideas from public use, in violation of the First Amendment. U.S. Const. amend. I. Pet. 12.

As a preliminary matter, it should be noted that CCC's argument is based on a fundamental mischaracterization of the court's actions below. The Second Circuit's decision to preserve copyright protection for the Red Book guidebooks does not involve suppression of ideas based on their content. Rather, the decision properly determined that the Red Book valuations, as well as their selection and arrangement, constituted original expressions. Pet. App. 13a, 14a.[12] As such, the court properly held that CCC was not entitled to copy these original expressions under the Copyright Act.[13]

---

[12] This ruling notwithstanding, CCC incorrectly persists in its Petition on labeling the Red Book's valuations as facts or data. *See, e.g.*, Pet. i (describing valuations as "data"); Pet. 6 (describing its file as containing only Red Book "price data"); *id.* (characterizing its use as only of Red Book's "numerical data"); Pet. 10 (characterizing Second Circuit as protecting "price data"); Pet. 17, n.10 (describing valuations taken as "facts"); Pet. 19 (criticizing Second Circuit for not taking into account "factual character of the Red Book materials"); *id.* (describing valuations as "price data").

The opinion below clearly held that the Red Book is not a compendium of pre-existing facts (Pet. 12a), and CCC has not presented this question for this Court's review. Accordingly, the court should ignore CCC's attempt to resurrect this issue.

[13] Under 17 U.S.C. § 102, the Copyright Act affords protection to, *inter alia*, original "literary works," which include "works, other than audiovisual works, expressed in words, *numbers*, or other verbal or *numerical symbols* or indicia[.]" 17 U.S.C. § 101 (emphasis added).

By affording protection to original expression, the Act necessarily restricts others from using these expressions without permission of the copyright owner. Thus, the Act establishes "a delicate equilibrium" between preserving the "incentive to create" and "limit[ing] the extent of that protection so as to avoid the effects of monopolistic stagnation." *Computer*

The Second Circuit's decision to protect original expression is in accord with the Copyright Act and clearly not in violation of the First Amendment. As the opinion below stated:

> [t]here can be no First Amendment justification for the copying of expression along with the idea simply because the copier lacks either the will or the time or energy to create his own independently evolved expression. The First Amendment ... does not offer a governmental subsidy [. . .] at the expense of authors whose well-being is also a matter of public interest.

Pet. App. 29a, n.27, *quoting* 1 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright*, § 1.10[D] at 1-98 to -98.1 (1994) ("*Nimmer*").

Thus, while there is a First Amendment right to obtain and copy facts and underlying ideas, the First Amendment does not provide a right for a competitor to use the original expressions of authors, such as Maclean Hunter. CCC contorts principles of copyright law in arguing that withholding Red Book's valuations from the public violates the First Amendment.

B. The Court's Decision To Withhold The Merger Doctrine Is Consistent With Copyright Law and First Amendment Principles.

CCC specifically argues that the Second Circuit's merger doctrine analysis is based on an invalid content-based determination. Again, CCC's argument ignores the Second Circuit's finding that the Red Book valuations were original expressions. In deciding to withhold the merger doctrine, the Second Circuit properly found that protecting Maclean Hunter's original ex-

---

Associates Int'l, Inc. v. Altai, Inc., 982 F.2d 693, 696 (2nd Cir. 1992). *See also Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 558 (1985) ("[I]t should not be forgotten that the Framers intended copyright itself to be the engine of free expression ... [b]y establishing a marketable right to the use of one's expression...").

pressions removed no ideas from the public realm. Pet. App. 26a-30a. As explained below, this decision is consistent with the merger doctrine and its precedent, as well as with the First Amendment.

Under the merger doctrine, "expression is not protected in those instances where there is only one or so few ways of expressing an idea that protection of the expression would effectively accord protection to the idea itself." *Kregos v. Associated Press*, 937 F.2d 700, 705 (2d Cir. 1991) (footnote omitted); *see also Baker v. Selden*, 101 U.S. 99 (1879). In such situations, the expression is said to have "merged" with the idea, and thus is uncopyrightable. *Id.*

In deciding whether to apply the merger doctrine, the central question is whether there is a risk of withholding an idea from the public realm if its expression is copyrighted. 3 *Nimmer*, § 13.03[B] at 13-75. *See also Herbert Rosenthal Jewelry Corp. v. Kalpakian*, 446 F.2d 738, 742 (9th Cir. 1971) (describing the question as whether protecting expression "would confer a monopoly of the 'idea' upon the copyright owner. . . .").

Courts have undertaken such an analysis by using the "abstractions test" to determine the separability of the idea from its expression. In an oft-cited decision (about the originality of a play), Judge Learned Hand explained that the more abstract the idea, the less likely its expression will merge with the underlying idea. *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930), *cert. denied*, 282 U.S. 902 (1931).

> Upon any work, and especially upon a play, a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the play is about, and at times might consist only of its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could pre-

> vent the use of his "ideas," to which, apart from their expression, his property is never extended.

Pet. App. 19a-20a, *quoting Nichols*, 45 F.2d at 121. Thus, while copying the text of a play would clearly violate its copyright, closely imitating the general plot line would not. 45 F.2d at 121.[14]

The court below appropriately applied such an analysis and concluded that there was little risk that protecting the Red Book valuations would extend to Maclean Hunter a monopoly over all valuations of used vehicles. To the contrary, the court found the idea of valuing used cars to be sufficiently abstract so that any number of specific expressions of value were possible. "Others, including CCC, remain free to value used cars and to profit from their valuations." Pet. App. 30a, n.28. Thus, the court's decision to withhold the merger doctrine was appropriate and in line with precedent applying the "abstractions test."

The court below also declined to apply the merger doctrine on the grounds that the Red Book editors' valuations were subjective predictions of future prices rather than "reports of historical prices" or "mechanical derivations of . . . prices or other data." Pet. App. 12a-13a. The court's decision to preserve copyright protection for expressions of opinion and predictive analysis (what the court below has termed "soft ideas") is not a new, impermissible content-based determination, as CCC contends (Pet. 12), but follows copyright principles and precedent.

---

[14] *See also Kregos*, 937 F.2d at 707 (finding that "'idea' for purposes of the merger doctrine, remains the general idea that statistics can be used to assess pitching performance," which did not merge with the expression of the particular pitching form used to organize the statistics); *Educational Testing Services v. Katzman*, 793 F.2d 533, 540 (3d Cir. 1986) (refusing to apply the merger doctrine to test questions on grounds that the test questions did not represent the only means of expressing the ideas and that anyone "using its own resources" could "devise questions designed to test these concepts.").

Courts have extended copyright protection to original valuations or analyses on the basis that protection of these expressions would not bar access to underlying information or data. In *Wainwright Sec. v. Wall Street Transcript Corp.*, 558 F.2d 91, 96 (2d Cir. 1977), *cert. denied* 434 U.S. 1014 (1978), for example, the court enjoined the publication of summaries of analytical research and financial predictions because it appropriated "almost verbatim the most creative and original aspects of the report. . . ." The court distinguished this type of appropriation from "legitimate coverage of a news event" which would have fairly used only the facts or ideas reported. *Id. See also Marshall & Swift v. BS & A Software*, 871 F. Supp. 952, 962 (W.D. Mich. 1994) (enjoining copying of tables of cost estimations on basis that they were expressions of opinion and not statements of fact).

Expressions of opinion or analysis are distinguishable from discoveries of fact or interpretations of a historical event, where preserving the copyright might prevent dissemination and further analyses of those facts. *See, e.g., Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972 (2d Cir.), *cert. denied*, 449 U.S. 841 (1980) (finding historical interpretation of Hindenburg unprotected); *Gates Rubber Co. v. Bando Chemical Indus., Ltd.*, 9 F.3d 823 (10th Cir. 1993) (denying protection to "constants" used in a computer program because they were deemed to be pre-existing facts).[15]

With respect to Red Books' valuations, the court below properly concluded that copyrighting the Red Book editors' subjective expressions would not deny the public access to the

---

[15] CCC relies on *Gates* to suggest that the question of valuation is one of recurring significance. Pet. 11. It should be clear, however, that there is no conflict between *Gates* and the opinion below. *Gates* does not concern the "opinion" of an engineer (as CCC states), but the "scientific observation" of fact. 9 F.3d at 842. As the court in *Marshall & Swift* explained, the type of non-protectable analysis of fact in *Gates* distinguishes it from cases involving expressions of opinion. 871 F. Supp. at 962.

information underlying their analyses. The court recognized correctly that only the opinions of Red Book editors were copyrighted, not the idea of valuation or any economic tools that might exist for the public — or CCC for that matter — to analyze the car market on its own. Pet. App. 29a-30a. Accordingly, the court fulfilled the purpose of the Copyright Act in protecting original expression while preserving the free dissemination of ideas and the right to research those ideas and express original opinions on the subject.

C. The Court's Decision Does Not Confer A Statutory Monopoly Over Ideas.

The opinion below did not create a statutory monopoly over the idea of valuing used vehicles.[16] Rather, the court commented that:

> Maclean Hunter makes no attempt, for example, to monopolize the basis of its economic forecasting or the factors that it weighs; the Red Book's entries are no more than predictions of Red Book editors of used car values for six weeks on a rough regional basis. As noted above, Red Book specifies in its introduction that "[y]ou, the subscriber, must be the final judge of the actual value of a particular vehicle."

Pet. App. 28a-29a, *quoting* the Red Book.

---

[16] CCC does not identify what "idea" the court of appeals has taken from the public domain in the statutory monopoly section of its brief. Pet. 19-26. CCC appears, on the one hand, concerned that a monopoly should not exist over pre-existing facts (*see, e.g.*, Pet. 19, 21, 23, 24) and, on the other hand, concerned that opinions should not be monopolized. *See, e.g.*, Pet. 23-25. In any event, Respondent Maclean Hunter presumes CCC was concerned that the opinion below has created a monopoly over the idea of valuing vehicles since that is the only real "idea" at issue. As discussed in note 12, *infra*, CCC has failed to raise, as an issue presented here, whether or not the court below properly decided that the valuations were opinions instead of facts.

Maclean Hunter seeks only to create a "monopoly" over its own valuations, deemed "original creations" by the court below (Pet. App. 13a). Preserving copyright protection for these valuations, as well as for the selection and arrangement of the Red Book, is consistent with the Copyright Act's intent to preserve the incentive to create (*see* note 13, *infra*). Such protection does not impede the progress of science and the arts, but promotes these goals.

As the court below explicitly stated, CCC is still free to value vehicles itself. Pet. App. 30a, n.28. CCC, however, does not want to use the non-protected raw data (*e.g.*, factual information regarding makes and models of used cars) in order to derive its own valuation. Pet. 23a-24a. Instead, CCC seeks to use and sell the original valuations created by Red Book editors in CCC's own published products, in essence marketing the equivalent of a Maclean Hunter derivative work without authorization.[17] In this regard, CCC is not looking for simply a "free hand to build upon the [factual] work of [its] predecessors," *Hoehling*, 618 F.2d at 980; CCC is looking for a free handout. CCC wants to engage in wholesale copying of the original valuations created by Red Book editors.[18] Since the issue of whether or not these valuations were original was decided by the court below, and since CCC has not properly appealed the Second Circuit's determination of originality of these valuations, it cannot now disguise its objections to the finding of originality behind a statutory monopoly framework.

---

[17] Only Maclean Hunter has the exclusive right to prepare derivative works based upon its original expressions. 17 U.S.C. §§ 101, 106(2).

[18] CCC suggests that, because courts have granted public use of factual compilations which are "formed by an author's opinion or judgment" (Pet. 24, citing *Hoehling* and *Gates* among other cases), CCC should also have access to the Red Book valuations. The holdings in *Hoehling* and *Gates* are not relevant to the present situation, however. As explained in Section Ib, *infra*, those cases concerned non-protectable interpretations and compilations of pre-existing facts. The Red Book valuations, on the other hand, contain original, subjective expressions which are legitimately copyrighted.

II. The Time At Which A Court Applies The Merger Analysis Has No Impact On This Case.

Despite CCC's arguments to the contrary, the issue of *when* to apply the merger doctrine is not relevant to this case. The court below noted that, in the Second Circuit, "consideration of the merger doctrine takes place in light of the alleged copying to determine if the infringement has occurred, rather than in analyzing the copyrightability of the original work."[19] CCC argues that applying a merger analysis at the later, infringement stage distorts the analysis because courts look at *both* non-protected and protected materials when analyzing whether the expression and idea merge. Pet. 15-16.

Any conflict among the circuits is not relevant to this case, however, because the court of appeals examined only protected materials when it conducted its merger analysis. The court was not, as CCC contends (Pet. 13), "influenced by factors which have no relation to the protectability of the [Red Book]."[20] The court compiled a laundry list of the many aspects of the Red Book that constituted original expression (*e.g.*, vehicle valu-

---

[19] Courts either apply the merger doctrine 1) when determining whether the material merits copyright protection or 2) when determining whether infringement has occurred. *See Mason v. Montgomery Data, Inc.*, 967 F.2d 135, 138, n.5 (5th Cir. 1992). The court below commented that "[a]ssessing merger in the context of alleged infringement will normally provide a more detailed and realistic basis for evaluating the claim that protection of expression would inevitably accord protection to an idea." Pet. App. 28a, *quoting Kregos*, 937 F.2d at 705.

[20] Remarkably, CCC's primary support for this point is that the court of appeals looked beyond the protectable elements of selection and arrangement in the Red Book and also looked at the "*facts* contained in the compendium." Pet. 17, n.10 (emphasis added). CCC's concern is completely unfounded, however, since the valuations contained in the charts constitute protectable expression as much as the selectivity and arrangement involved. Thus, in looking at the valuations, the court of appeals did not look beyond protected expression.

ations, mileage adjustments), thereby separating protected expression from non-protected expression (*e.g.*, names of cars or models). Pet. App. 12a-15a. The court below then properly compared the protected original expressions with the materials systematically copied by CCC and concluded that the merger doctrine should be withheld. *See* Section I.B., *infra.*

CCC's attempt to describe a real conflict among circuits concerning when to apply the merger doctrine is, once again, an attempt to resurrect its contention that it only copied facts. For example, in criticizing the Second Circuit's approach toward the merger doctrine, CCC states that:

> [t]he difference in this approach becomes apparent in dealing with *minimally expressed, factual compilations* where a significant portion of the work comprises data which are not eligible for copyright protection.

Pet. 16-17 (emphasis added). CCC here mischaracterizes the valuations as facts rather than original, non-factual opinions, ignoring the Second Circuit's holding. CCC should not be permitted to use an alleged conflict among the circuits — which bears no relevance to this case — as a springboard for seeking review for an argument it has not properly raised on appeal.

III. Reference To The Red Book In Public Statutes Does Not Remove Copyright Protection.

The opinion below correctly held that by being referenced in various statutes and regulations, the Red Book has *not* fallen into the public domain and, thereby, lost its copyright protection. Pet. App. 31a. No authority that CCC cites supports the position that copyright protection vanishes merely because a publication is referenced in a public law. Pet. 26-29.

Moreover, CCC again seeks to manufacture a non-existent conflict among circuits on this issue. Pet. 27-28. Only one

court of appeals decision has reached this issue: the Second Circuit's opinion in this case. The First Circuit's decision in *Building Officials & Code Adm. v. Code Technology, Inc.*, 628 F.2d 730 (1st Cir. 1980) ("BOCA"), discussed but did not apply the "public domain" doctrine as a holding to the facts of that case. As the court below points out:

> [a]lthough the First Circuit Court of Appeals, in *BOCA*, expressed sympathy with the arguments here advanced by CCC, its ruling is not a holding to that effect. The Court of Appeals merely vacated a preliminary injunction, expressing doubts as to the plaintiff copyright holder's likelihood of success, and remanding for a full hearing on whether the plaintiff had lost its copyright protection by reason of the adoption of its previously protected work (a construction code) as part of the laws of Massachusetts.

Pet. App. 31a.[21]

Not only was the *BOCA* decision merely a preliminary ruling, but it also addressed a set of facts clearly distinguishable from this case. None of the four states (Connecticut, New Jersey, New York, and Pennsylvania) has literally incorporated the text of any issue of the Red Book into its written statutes, as Massachusetts did when it adopted and distributed BOCA's code (known as the *Commonwealth of Massachusetts State Building Code, 3rd Ed*). 628 F.2d at 732. As stated earlier, these four states reference the Red Book as a valuation source that can be used as one of several valuation methods. *See* Factual Background, pp.4-5 *infra*.

---

[21] On remand, the defendants in the *BOCA* case moved to dismiss the case on the basis that the First Circuit had indicated that adopting the building code as a state regulatory scheme placed the code in the public domain. The district court denied the motion to dismiss stating that, as the First Circuit had expressed, a full hearing was necessary to decide the issue. *Building Officials & Code Adms. Int'l Inc. v. Code Technology Inc.*, 210 U.S.P.Q. 289 (D. Mass. 1980). No further opinion is reported.

Other than *BOCA*, CCC's only support for its public domain argument is *NADA Servs. Corp. v. CCC Information Servs. Inc.*, No. 91 C 4593, 1991 WL 287961 (N.D. Ill., Nov. 15, 1991) ("NADA"). Pet. 29. In *NADA*, the court did not decide the merits of the copyright misuse claim; the court merely denied NADA's motion for preliminary injunction.[22] The *NADA* case has since settled with no final judgment by that court on the merits.

Based on its analysis of *BOCA*, *NADA*, and other cases, the court below tersely concluded that "[n]o authority cited by CCC directly supports the district court's view" that the Red Book had fallen into the public domain. Pet. App. 31a.

In contrast with the absence of supporting authority for CCC's argument, several cases support the court of appeal's finding that the Red Book did not fall into the public domain, and, therefore, did not lose its copyright protection. In *Practice Management Information Corp. v. American Medical Ass'n*, 877 F. Supp. 1386 (C.D. Cal. 1994), for example, the court upheld copyright protection for privately developed reference codes that a federal agency required physicians to use when submitting claims for reimbursement. *See also Rocky Mountain Motor Tariff Bureau v. G.R. Leonard & Co.*, 652 F. Supp. 1473, 1475 (D. Colo. 1987) (tariff guidebook was not "uncopyrightable simply because it has been filed with the ICC and published in accordance with federal law.").[23]

---

[22] The *NADA* decision relied exclusively on the First Circuit's decision in *BOCA*. *NADA*, 1991 WL at *3.

[23] Further support for the court of appeal's decision can be found in *Del Madera Properties v. Rhodes and Gardner, Inc.*, 637 F. Supp. 262 (N.D. Cal. 1985), *aff'd*, 820 F.2d 973 (9th Cir. 1987) and *Rand McNally & Co. v. Fleet Management Sys. Inc*, 591 F. Supp. 726 (N.D. Ill. 1983). In *Del Madera Properties*, the court conferred copyright protection to a privately-created map that was later adopted by a city council as its zoning plan. 637 F. Supp. at 264. In *Rand McNally*, the court held that the "public domain" doctrine did not extend to a privately created mileage guide that was filed

Furthermore, as a matter of policy, if copyright protection vanished every time a state referenced an article, textbook, code, or guidebook, copyright protection would be meaningless. Authors and publishers would avoid producing material that might be of potential use to state, local, or federal governments.[24] Contrary to the intention of copyright protection, publishers would have no economic incentive to create and disseminate ideas useful to the public interest. *Harper & Row*, at 558; *Practice Management*, 877 F. Supp. at 1392-93 ("[p]rivate industry would have no incentive to spend enormous sums on research and development knowing that the government could at any time incorporate such work).[25]

Moreover, the issue here is not whether there is a denial of public access, in violation of due process (Pet. 28); rather, the issue is whether CCC can appropriate the Red Book for commercial use for profit.[26] According to Nimmer, commercial use by a publisher's competitor does not abrogate copyright protection where reference to a copyrighted work in a statute has

---

with the government; copyright protection of the map was not lost simply because the guide was relied upon, by government regulation, as one source of factual data. 591 F. Supp. 734-736. Although CCC attempts to distinguish these cases (Pet. 28, n.16), it does so on the mistaken belief that the four states at issue here mandate the incorporation of the Red Book into the law.

[24] In addition, if the Court determined that a state's reference to the Red Book thrust the valuations into the public domain, the Court would be sanctioning a governmental taking without compensation, in violation of the Fifth and the Fourteenth Amendments of the Constitution, *Roth v. Pritikin*, 710 F.2d 934, 939 (2d Cir.), *cert. denied*, 464 U.S. 961 (1983), and the result of the Court's action would be contrary to the principles of the Supremacy Clause. *See also Practice Management*, 877 F. Supp. at 1393.

[25] Even CCC's copyrighted computer valuation reports database, which is referenced in Connecticut's laws (Resp. App. 4a-5a), would lose protection under its theory.

[26] The magistrate judge specifically rejected CCC's fair use defense (Pet. App. 56a-59a, 63a); CCC's "public domain" or public access arguments are a reformulation of this defense.

occurred. 1 *Nimmer*, § 5.06[C] at 5-60 (footnote omitted.) While Nimmer argues that the adoption of a private work into law might well justify a fair use defense for personal use, Nimmer doubts

> whether [the adoption] should also immunize from copyright liability a competitive commercial publisher, as in [*BOCA*], at least where the copyright owner of the code, or its licensee, has published and adequately disseminated authorized copies of the code. To vitiate copyright in such circumstances could, without adequate justification, prove destructive of the copyright interest in encouraging creativity in connection with the increasing trend toward state and federal adoption of model codes.

Id.

Here, the Red Book has been published and adequately disseminated; in fact, the guidebooks are easily available to insurance companies and to consumers by subscription and in public libraries. Maclean Hunter has not limited the distribution of the Red Book to any end-user, only to competitors republishing its materials for profit. CCC should not be permitted to manipulate the public domain doctrine for its pecuniary gain.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

Stephen M. Feldman
Carolyn P. Carmody
Wendy S. Lader
SPIEGEL & McDIARMID
1350 New York Ave., N.W.
Washington, D.C. 20005
(202) 879-4000

Thomas P. Sarro
William E. Jackson *
LARSON AND TAYLOR
727 - 23rd Street South
Arlington, Virginia 22202
(703) 920-7200

* *Counsel of Record*

Counsel for Respondent

Dated: July 7, 1995

FEDERAL STATUTES

United States Copyright Act of 1976, 17 U.S.C. §§ 101 - 1101.

17 U.S.C. § 101. Definitions

Except as otherwise provided in this title, as used in this title, the following terms and their variant forms mean the following:

A "derivative work" is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a "derivative work."

"Literary works" are works, other than audiovisual works, expressed in words, numbers, or other verbal or numerical symbols or indicia, regardless of the nature of the material objects, such as books, periodicals, manuscripts, phonorecords, film, tapes, disks, or cards, in which they are embodied.

17 U.S.C. § 102. Subject matter of copyright: In general

(a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:

(1) literary works;
(2) musical works, including any accompanying words;
(3) dramatic works, including any accompanying music;
(4) pantomimes and choreographic works;
(5) pictorial, graphic, and sculptural works;
(6) motion pictures and other audiovisual works;
(7) sound recordings; and
(8) architectural works.

(b) In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

17 U.S.C. § 106. Exclusive rights in copyrighted works

Subject to sections 107 through 120, the owner of a copyright under this title has the exclusive rights to do and to authorize any of the following:

(1) to reproduce the copyrighted work in copies or phonorecords;
(2) to prepare derivative works based upon the copyrighted work;
(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or transfer of ownership, or by rental, lease, or lending;
(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and
(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.

17 U.S.C. § 501. Infringement of copyright

(a) Anyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 118 or of the author as provided in section 106A(a), or who imports copies or phonorecords into the United States in violation of section 602, is an infringer of the copyright or right of the author, as the case may be. For purposes of this chapter (other than section 506), any reference to copyright shall be deemed to include the rights conferred by section 106A(a). As used in this subsection the term "anyone" includes any State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his or her official capacity. Any State, and any such instrumentality, officer, or employee, shall be subject to the provisions of this title in the same manner and to the same extent as any nongovernmental entity.

STATE OF CONNECTICUT

INSURANCE DEPARTMENT

Bulletin No. IC-10
December 10, 1992

TO: COMPANIES LICENSED IN CONNECTICUT TO WRITE AUTOMOBILE LIABILITY AND/OR AUTOMOBILE PHYSICAL DAMAGE INSURANCE

RE: SECTION 38a - 353 (PUBLIC ACT 87-158) CALCULATING THE VALUE OF TOTALLED MOTOR VEHICLES

This Bulletin supplements Bulletin No. IC-4 dated August 28, 1987, Bulletin IC-5 dated October 27, 1987, and Bulletin No. IC-9 dated June 26, 1992.

Sec. 38a-353 of the Connecticut General Statutes requires that whenever any damaged motor vehicle covered under an automobile insurance policy has been declared to be a constructive total loss by the insurer, the insurer shall, in calculating the value of such vehicle for purposes of determining the settlement amount to be paid to the claimant, use at least the average of the retail values given such vehicle by (1) The National Automobile Dealers Association Used Car Guide and (2) one other automobile industry source which has been approved for such use by the Insurance Commissioner.

Pursuant to the authority of this Statute, the National Markets Reports Inc., Red Book Region A ("Red Book"), the Automatic Data Processing Autotrak Valuation Service for Connecticut local market conditions ("Autotrak"), and the Local Market Valuation Service of CCC Information Services Inc. ("CCC") are hereby approved as second sources for calculating the value of a damaged motor vehicle declared to be a constructive total

loss. The terms and conditions of the above described Bulletins remain in full force.

The Director of the Consumer Affairs Division, however, is hereby directed to maintain a list of those companies that are approved by the Insurance Department as second sources, and to accept and review applications of other valuation service companies that desire to be added to this approved list. Therefore, in the future, insurers will not be notified by bulletin of additional approvals, but will be required to determine the approval of the other second sources by contacting the Consumer Affairs Division of the Insurance Department.

Insurers are further reminded of the prohibition against "source shopping" as detailed in Bulletin No. IC-9.

Robert R. Googins
Insurance Commissioner

MILEAGE CHART

	0 5000	5001 10000	10001 15000	15001 20000	20001 25000	25001 30000	30001 35000	35001 40000	40001 45000	45001 50000	50001 55000	55001 60000	60001 65000	65001 70000	70001 75000	75001 80000	80001 85000	85001 90000	90001 UP
SCHEDULE (1)																			
1990	400	275	0	275	425	550	700	850	1000	1150	1300	1450	1600	1750	1900	2050	2175	2250	2350
1989	575	450	325	75	0	250	375	525	675	825	975	1125	1275	1425	1575	1725	1850	1950	2025
1988	725	600	175	375	300	50	0	200	350	500	650	800	950	1100	1250	1400	1525	1650	1700
1987	825	700	75	475	400	325	75	50	0	175	325	475	625	775	925	1075	1200	1300	1375
1986	925	800	100	600	500	425	350	300	75	25	0	150	300	450	600	750	875	975	1050
1985	1000	900	775	700	600	525	450	400	325	300	75	50	25	0	275	400	550	650	725
1984	1050	950	850	750	675	600	525	475	400	350	300	275	75	50	25	0	200	300	400

ADD DEDUCT

M=1

M=2

M=3

M=4

SCHEDULE (2)																			
1990	425	300	0	300	450	600	775	925	1100	1250	1425	1575	1750	1900	2050	2200	2350	2450	2550
1989	600	475	350	275	0	250	400	575	750	900	1050	1225	1375	1550	1700	1850	2000	2100	2200
1988	775	650	200	400	300	75	0	225	375	550	700	875	1025	1200	1350	1500	1650	1750	1850
1987	925	775	50	525	425	350	275	50	0	200	350	500	675	825	975	1150	1300	1400	1475
1986	1025	875	750	625	525	450	375	300	75	50	0	150	325	475	650	800	950	1050	1125
1985	1100	975	850	750	650	575	500	425	350	300	275	50	25	0	300	450	550	625	775
1984	1150	1025	925	825	725	650	575	500	425	375	325	275	75	50	25	0	250	350	425

ADD DEDUCT

SCHEDULE (3)																			
1990	450	325	0	325	500	700	875	1050	1225	1425	1600	1800	1975	2150	2350	2525	2700	2800	2900
1989	625	500	375	275	0	250	475	650	850	1025	1200	1400	1575	1750	1950	2125	2300	2400	2500
1988	800	675	225	400	325	75	0	225	400	625	800	1000	1175	1350	1550	1725	1900	2000	2100
1987	975	825	75	550	450	350	275	50	0	225	400	600	775	950	1150	1325	1500	1600	1700
1986	1100	950	800	675	575	475	400	325	275	50	0	175	375	550	750	925	1100	1200	1275
1985	1200	1075	925	825	700	625	525	450	375	325	275	50	25	0	325	500	675	775	875
1984	1275	1125	1000	875	775	700	600	525	450	400	350	275	75	50	25	0	300	400	500

ADD DEDUCT

SCHEDULE (4)																			
1990	500	375	0	375	550	750	925	1100	1275	1475	1650	1850	2025	2200	2400	2575	2750	2850	2950
1989	675	550	425	275	0	250	525	700	900	1075	1250	1450	1625	1800	2000	2175	2350	2450	2550
1988	850	725	275	450	375	75	0	225	450	675	850	1050	1225	1400	1600	1775	1950	2050	2150
1987	1025	875	75	600	500	400	325	50	0	250	450	650	825	1000	1200	1375	1550	1650	1750
1986	1150	1000	850	725	625	525	450	375	325	50	0	200	400	575	775	950	1125	1225	1300
1985	1275	1125	1000	875	775	700	600	525	475	400	325	275	75	50	25	0	325	425	525
1984	1350	1225	1075	975	875	775	700	625	550	475	425	350	275	75	50	25	0	325	425

ADD DEDUCT

DO NOT USE THIS CHART UNTIL YOU HAVE READ THE INSTRUCTIONS ON THE PRECEDING PAGE.
SEE INDIVIDUAL LISTINGS FOR OPTION & MILEAGE CLASSIFICATIONS. FOR LT. TRUCKS (NON COMMERCIAL) USE M = 3.
MAXIMUM ADDITION OR DEDUCTION SHOULD NOT EXCEED 50% OF THE PUBLISHED WHOLESALE VALUE.

1/1/91

LIGHT DUTY TRUCKS

DOMESTIC & IMPORT
OPTION VALUATION CHART

OPTION ADD FOR	Avg. '90 List Price	90	89	88	87	86	85 thru 84
AM-FM	169	100	75	50	50	25	25
Add Stereo	79	75	75	50	50	25	25
Add Tape.	158	75	75	50	50	25	25
Add Equal./Prem. System	561	300	200	150	100	75	NA
Add Elect. Tune	153	75	75	50	50	25	N/C
Auto. Trans.	576	375	325	275	250	225	175
Auto. Trans. W/O.D.	740	475	425	350	300	250	200
Power Door Locks	191	100	100	75	50	50	25
Power Windows	270	150	125	75	50	50	25
Tilt Wheel	128	100	75	50	50	50	25
Cruise Control	212	100	100	75	50	50	25
Electric Seat (6 way)	252	150	100	75	50	25	25
Leather Seats	812	475	400	350	275	175	50
Rear Step Bumper	165	75	50	50	25	25	N/C
Dual Wheel Pkg. (1 Ton)	710	500	400	350	300	250	200
Sliding Rear Window	126	75	75	50	50	25	N/C
Electric Defogger	161	100	75	50	50	25	N/C
Deep Tinted Glass	362	300	225	150	100	75	50
Alum/Custom Wheels	300	200	175	100	75	50	25
32 gal and up Fuel Capacity	187	125	100	100	100	100	50
Complete Snowplow	1700	1000	800	550	450	450	300
A/C ★ T=1	824	600	500	375	300	225	175
A/C • T=3, T=2	984	650	575	475	400	325	225
Dual A/C ☐ T=3	1293	825	725	600	525	450	300
Dual A/C ■ T=2	1600	925	825	700	625	550	400
7 & 8 Pass. ☐ ■ T=3, T=2	316	200	175	150	100	100	100
12 Pass. ■ T=2	661	400	325	300	200	200	175
15 Pass. ■ T=2	982	500	425	375	275	250	200
4 Wheel Anti Lock Brakes	1160	500	400	NA	NA	NA	NA
"X" code trucks are valued with the following equipment; 4 or 5 speed manual, power steering & power brakes. Deduct if not so equipped.							
With 3 Speed Manual	Std.	350	325	300	275	250	175
Without Power Steering	Std.	325	275	225	175	150	125
Without Power Brakes	Std.	150	100	100	75	50	N/C
★ Pickup, Chassis Cabs and all others T=1 ■ Vans T=2			☐ Suburban T=3 • Suburbans and Vans T=3, T=2				

8/12/15 Passenger Value for 8/12/15 Passenger when not shown as specific model.

(For Light Truck (non commercial) use M=3 mileage chart)

M = 9 *Do Not Use Chart* (Commercial Vehicle)

Average Retail Prices Shown: Wholesale and Finance is 85% of Retail.